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[1955] Ch. [1955] P.
[1955] 1 Q.B. [1955] 2 Q.B.
[1955] A.C.

TABLE OF CASES REPORTED
IN THIS VOLUME

A PAGE

Air Ministry, Chivers & Sons Ld. *v.* Queen's College, Cambridge (Third Parties) - 585
Allen, Public Trustee *v.* *In re* Lewis, decd. - - - - 104
Attorney-General, Bulmer *v.* 558
Attorney-General *v.* Parsons - 664
Attorney-General, Prince Ernest of Hanover *v.* - 440
Avon and Dorset River Board, Mills *v.* - - - - - 341

B

Bank of England, Welch *v.* - 508
Barclays Bank Ld. *v.* Everitt. *In re* Rydon's Settlement - 1
Barclays Bank Ld. *v.* Midgley. *In re* Midgley, decd. - 576
Barrow *v.* Gillard. *In re* White's Will Trusts - - 188
Birmingham Corporation, Prescott *v.* - - - - 210
British Nylon Spinners Ld. *v.* Imperial Chemical Industries Ld. - - - - 37
Broadway Cottages Trust, Inland Revenue Commissioners *v.* - - - - - 20
Bullock *v.* Lloyds Bank Ld. - 317
Bulmer *v.* Attorney-General - 558
Burton's Settlement Trusts, *In re.* Public Trustee *v.* Montefiore - - - - 60, 348
Burton's Settlements, *In re.* Scott *v.* National Provincial Bank Ld. - - - - - 82
Butterley Co. Ld., Inland Revenue Commissioners *v.* 453

C PAGE

Cardiff Corporation, Smith *v.* (No. 2) - - - - - 159
Chelsea Estates Investment Trust Co. Ld. *v.* March - 328
Chivers *v.* Crossley. *In re* Crossley's Settlement Trusts - - - - - 627
Chivers & Sons Ld. *v.* Air Ministry. Queen's College, Cambridge (Third Parties) - 585
Coates, decd., *In re.* Ramsden *v.* Coates - - - 495
Cochrane, *In re.* Shaw *v.* Cochrane - - - - 309
Consett Iron Co. Ld., Martell *v.* - - - - - - 363
Cooper *v.* Critchley - - 431
Cox *v.* Grotrian. *In re* Grotrian 501
Critchley, Cooper *v.* - - 431
Crossley's Settlement Trusts, *In re.* Chivers *v.* Crossley 627

D

Defiant Cycle Co. Ld., *In re* - 490
Deverall *v.* Grant Advertising Inc. - - - - - - 111
Dill, Martins Bank Ld. *v.* *In re* Murray, decd. - - 69
Dooland, Moorhouse (Inspector of Taxes) *v.* - - - 284
Dumont (F. A.) Ld., *Ex parte* the Debtor *v.* *In re* Majory, a Debtor - - 600

E

Everitt, Barclays Bank Ld. *v.* *In re* Rydon's Settlement - - - - - 1

G PAGE

Gillard, Barrow *v.* *In re* White's Will Trusts - - 188
Grant Advertising Inc., Deverall *v.* - - - 111
Grotrian, *In re.* Cox *v.* Grotrian - - - - 501

H

Hall's Settlement, *In re.* Sanderson *v.* Inland Revenue Commissioners - 128
Harper *v.* Secretary of State 238
Harrison's Share Under a Settlement, *In re* - - 260
Hartley Baird Ld., *In re* - 143
Heathcoat-Amory and Minister of Agriculture and Fisheries, Merricks *v.* - 567
Heron *v.* Public Trustee. *In re* Hooker's Settlement - 55
Holliman, Silsby *v.* - - 552
Holt *v.* Hutchinson. *In re* Hutchinson, decd. - - 255
Hooker's Settlement, *In re.* Heron *v.* Public Trustee - 55
Hutchinson, decd., *In re.* Holt *v.* Hutchinson - - 255

I

Imperial Chemical Industries Ld., British Nylon Spinners Ld. *v.* - - - - - 37
Inland Revenue Commissioners *v.* Broadway Cottages Trust - - - 20
Inland Revenue Commissioners *v.* Butterley Co. Ld. - - - - - 453
Inland Revenue Commissioners, Sanderson *v.* *In re* Hall's Settlement - - 128
Inland Revenue Commissioners *v.* Sunnylands Trust 20

J

Johnson (B.) & Co. (Builders) Ld., *In re* - - - - 634

L

Lewis, decd., *In re.* Public Trustee *v.* Allen - - 104
Lloyds Bank Ld., Bullock *v.* 317

M PAGE

Majory, A Debtor, *In re.* *Ex parte* the Debtor *v.* F. A. Dumont Ld. - - - 600
Makein, decd., *In re.* Makein *v.* Makein - - - - 194
March, Chelsea Estates Investment Trust Co. Ld. *v.* 328
Marfleet, Midland Bank Executor and Trustee Co. Ld. *v.* *In re* Martin, decd. 698
Martell *v.* Consett Iron Co. Ld. - - - - - 363
Martin, decd., *In re.* Midland Bank Executor and Trustee Co. Ld. *v.* Marfleet - - - - - 698
Martins Bank Ld. *v.* Dill. *In re* Murray, decd. - - 69
Matthews, Sheppard *v.* *In re* Overbury, decd. - - 122
Merricks *v.* Heathcoat-Amory and Minister of Agriculture and Fisheries - 567
Midgley, decd., *In re.* Barclays Bank Ld. *v.* Midgley 576
Midland Bank Executor and Trustee Co. Ld. *v.* Marfleet. *In re* Martin, decd. 698
Mills *v.* Avon and Dorset River Board - - - 341
Minister of Agriculture and Fisheries, Heathcoat-Amory and, Merricks *v.* - - 567
Montefiore, Public Trustee *v.* *In re* Burton's Settlement Trusts - - - 60, 348
Moorhouse (Inspector of Taxes) *v.* Dooland - - 284
Mousley *v.* Rigby - - - 139
Murray, decd., *In re.* Martins Bank Ld. *v.* Dill - 69

N

National Provincial Bank Ld., Scott *v.* *In re* Burton's Settlements - - - 82
Nottingham General Cemetery Co., *In re* - - - - 683

O

Overbury, decd., *In re.* Sheppard *v.* Matthews - - 122

P

PAGE

Parsons, Attorney-General *v.* 664
Prescott *v.* Birmingham Corporation - - - - 210
Prince Ernest of Hanover *v.* Attorney-General - - 440
Public Trustee *v.* Allen. *In re* Lucas, decd. - - - 104
Public Trustee, Heron *v.* *In re* Hooker's Settlement - 55
Public Trustee *v.* Montefiore. *In re* Burton's Settlement Trusts - - - 60, 348

Q

Queen's College, Cambridge (Third Parties). Chivers & Sons Ld. *v.* Air Ministry - 585

R

Ramsden *v.* Coates. *In re* Coates, decd. - - - 495
Rigby, Mousley *v.* - - 139
Robinson (Gunmakers) Ld., W. L. Thompson Ld. *v.* - 177
Ropner's Settlement Trusts, *In re* - - - - - 260
Russian Commercial and Industrial Bank, *In re* - - 148

PAGE

Rydon's Settlement, *In re.* Barclays Bank Ld. *v.* Everitt - - - - 1

S

Sanderson *v.* Inland Revenue Commissioners. *In re* Hall's Settlement - - - 128
Scott *v.* National Provincial Bank Ld. *In re* Burton's Settlements - - - 82
Secretary of State, Harper *v.* 238
Shaw *v.* Cochrane. *In re* Cochrane - - - - 309
Sheppard *v.* Matthews. *In re* Overbury, decd. - - 122
Silsby *v.* Holliman - - 552
Smith *v.* Cardiff Corporation (No. 2) - - - - 159
Sunnyland's Trust, Inland Revenue Commissioners *v.* 20

T

Thompson (W. L.) Ld. *v.* Robinson (Gunmakers) Ld. 177

W

Welch *v.* Bank of England - 508
White's Will Trusts, *In re.* Barrow *v.* Gillard - - 188
Williams' Will Trusts, *In re* - 260

TABLE OF CASES CITED AND JUDICIALLY NOTICED

ABBREVIATIONS

Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

			Page
Adam Eyton Ld., *In re*	36 Ch.D. 299; 3 T.L.R. 738	*R.*	270, 280
Adlard's Settlement Trust, *In re*	[1954] Ch. 29; [1953] 2 All E.R. 1437		102
Akeroyd's Settlement, *In re*	[1893] 3 Ch. 363	*Dist.*	310, 314, 315
Alabaster *v.* Harness	[1895] 1 Q.B. 339; 11 T.L.R. 96	*Dist.*	364, 378, 386, 401–6, 408, 412–5, 418, 425, 426
Aldin *v.* Latimer Clark, Muirhead & Co.	[1894] 2 Ch. 437		688
Alexander *v.* Alexander	2 Ves.Sen. 640	*R.*	97
Allcard *v.* Skinner	36 Ch.D. 145; 3 T.L.R. 751	*R.*	322, 327
Allchin (Inspector of Taxes) *v.* Coulthard	[1942] 2 K.B. 228	*R.*	222
Allen, *In re*	[1953] Ch. 810; [1953] 3 W.L.R. 637; [1953] 2 All E.R. 898		91
Allen *v.* Francis	[1914] 3 K.B. 1065; 30 T.L.R. 695	*R.*	426, 427
Alms (The) Corn Charity, *In re*	[1901] 2 Ch. 750		588
Anglo-French Co-operative Society, *In re*, *Ex p.* Pelly	21 Ch.D. 492	*R.*	649
Associated Provincial Picture Houses Ld. *v.* Wednesbury Corporation	[1948] 1 K.B. 223; 63 T.L.R. 623; [1947] 2 All E.R. 680	*R.*	228, 234
Astley *v.* New Tivoli Ld.	[1899] 1 Ch. 151	*R.*	658–60
Atkinson, *In re*	9 Morr. 193	*R.*	615
Atkinson, *In re*	[1930] 1 Ch. 47	*Appl.*	699, 703, 704
Attorney-General *v.* Bishop of Chester	1 Bro.C.C. 444	*R.*	193
Attorney-General *v.* Company of Proprietors of Margate Pier and Harbour	[1900] 1 Ch. 749	*R.*	541
Attorney-General *v.* Earl of Selborne	[1902] 1 K.B. 388; 18 T.L.R. 111		131
Attorney-General *v.* Haberdashers' Co.	1 My. & K. 420		105
Attorney-General *v.* Ironmongers' Co.	2 M. & K. 576		190
Attorney-General *v.* Leicester Corporation	[1943] Ch. 86		219
Attorney-General *v.* Llewellyn	58 L.T. 367		266
Attorney-General *v.* Lloyds Bank Ld.	[1935] A.C. 382	*R.*	64
Attorney-General *v.* Lloyds Bank Ld.	[1935] A.C. 382	*C.*	349, 357, 358, 362
Attorney-General *v.* Manchester Corporation	[1906] 1 Ch. 643		219
Attorney-General *v.* Milne	[1913] 2 K.B. 606; [1914] A.C. 765; 30 T.L.R. 476	*C.*	128, 134–6
Attorney-General of New South Wales *v.* Trethowan	[1932] A.C. 526	*Dist.*	239, 259

Attorney-General for Ontario *v.* Canadian Niagara Power Co.	[1912] A.C. 852	*R.*	173
Australian Direct Steam Navigation (Miller's case)	3 Ch.D. 661	*R.*	269, 279, 280
Avery *v.* Bowden	5 E. & B. 714		152
Baker (H. W.), *In re*	[1936] Ch. 61	*Dist.*	55, 58
Baker *v.* Jones	[1954] 1 W.L.R. 1005; [1954] 2 All E.R. 553	*R.*	379, 386, 414
Bank of Ireland *v.* Evans' Charities Trustees	5 H.L.C. 389	*Appl.*	509, 535
Bank of England *v.* Vagliano Bros.	[1891] A.C. 107; 7 T.L.R. 333		520
Barton *v.* London and North Western Railway Co.	24 Q.B.D. 77; 6 T.L.R. 70	*Appl.*	509, 534, 538
Barton *v.* London and North Western Railway Co.	38 Ch.D. 144; 4 T.L.R. 420	*Appl.*	509, 533
Barton *v.* North Staffordshire Railway Co.	38 Ch.D. 458; 4 T.L.R. 403	*Appl.*	509, 530, 542, 543, 545
Battley *v.* Faulkner	3 B. & Ald. 288	*R.*	530
Baxendale *v.* Bennett	3 Q.B.D. 525		517
Beaumont's Will Trusts, *In re*	[1950] Ch. 462; 66 T.L.R. (Pt. 1) 712; [1950] 1 All E.R. 802	*N.F.*	577, 584
Beaumont's Will Trusts, *In re*	[1950] Ch. 462; 66 T.L.R. (Pt. 1) 712; [1950] 1 All E.R. 802		705
Bebro, *In re*	[1900] 2 Q.B. 316	*Appl.*	601, 612, 614–6, 618, 619, 623
Bective *v.* Hodgson	10 H.L.C. 656	*R.*	631
Beere *v.* Hoffmister	23 Beav. 101	*R.*	99
Belcher *v.* Reading Corporation	[1950] Ch. 380; 65 T.L.R. 773; [1949] 2 All E.R. 969	*R.*	169
Berens, *In re*	[1926] Ch. 596; 42 T.L.R. 267		73
Bettesworth and Richer, *In re*	37 Ch.D. 535; 4 T.L.R. 248	*R.*	599
Beynon *v.* Thorpe	44 T.L.R. 610; 14 T.C. 1		288
Bird *v.* Randall	3 Burr. 1346		520
Birkdale District Electric Supply Co. Ld. *v.* Southport Corporation	[1926] A.C. 355		687
Biss, *In re*	[1903] 2 Ch. 40	*Appl.*	328, 336
Blackwell *v.* Blackwell	[1929] A.C. 318		191
Blakiston *v.* Cooper	[1909] A.C. 104; 25 T.L.R. 164; 5 T.C. 347	*C.*	285, 298–300, 302, 303
Blore *v.* Ashby	42 Ch.D. 682		547
Boaler, *In re*	[1915] 1 K.B. 21		560
Boards, *In re*	[1895] 1 Ch. 499	*R.*	704, 705
Bobbey *v.* W. M. Crosbie & Co.	84 L.J.K.B. 856	*R.*	426
Bolton *v.* Cannon	Freem. (K.B.) 393		669
Bosch *v.* Perpetual Trustee Co.	[1938] A.C. 463; 54 T.L.R. 467; [1938] 2 All E.R. 14	*R.*	208
Bouverie, *In re*	[1952] Ch. 400; [1952] 1 T.L.R. 355; [1952] 1 All E.R. 408	*R.*	74, 94
Boynton *v.* Ancholme Drainage and Navigation Commissioners	[1921] 2 K.B. 213		525
Brabant, *In re*	23 S.J. 779		491
Bradbury, *In re*	[1950] W.N. 558		106

Bradford Corporation *v.* Myers	[1916] 1 A.C. 242; 32 T.L.R. 113	*R.*	541
Bradford Navigation Co., *In re*	L.R. 10 Eq. 331; L.R. 5 Ch. 600	*R.*	693
Bradlaugh *v.* Gossett	12 Q.B.D. 27		570
Bradlaugh *v.* Newdegate	11 Q.B.D. 1	*R.*	377, 378, 399–404, 424, 427, 430
Braintree Union *v.* Rochford Union	81 L.J.K.B. 251; 28 T.L.R. 60	*R.*	206
Brett *v.* Brett	3 Add. 210	*R.*	448
Brewer *v.* Westminster Bank Ld.	[1952] 2 T.L.R. 568; [1952] 2 All E.R. 650	*N.F.*	509, 532, 537
British American Continental Bank Ld., *In re*	[1922] 2 Ch. 575; 38 T.L.R. 785	*F.*	148, 153
British Cash and Parcel Conveyors Ld. *v.* Lamson Store Service Co. Ld.	[1908] 1 K.B. 1006	*Appl.*	364, 383, 384, 409–12, 415, 416, 426, 427, 430
British Nylon Spinners Ld. *v.* Imperial Chemical Industries Ld.	[1953] Ch. 19	*F.*	37, 38, 41, 51
British Westinghouse Electric and Manufacturing Co. Ld. *v.* Underground Electric Railways Co. of London Ld.	[1912] A.C. 673	*R.*	182
Brock *v.* Wollams	[1949] 2 K.B. 388; [1949] 1 All E.R. 715	*R.*	205
Brocket *v.* Luton Corporation	[1948] W.N. 352		396
Bromley *v.* Tryon	[1952] A.C. 265	*Appl.*	69, 75, 76, 81
Brooks' Settlement Trusts, *In re*	[1939] Ch. 993; 55 T.L.R. 914; [1939] 3 All E.R. 920	*Dist.*	84, 103
Brown *v.* Buck	[1934] 4 D.L.R. 446	*R.*	184
Brown *v.* Higgs	8 Ves. 561		26
Brown *v.* Howard	4 Moore 508	*R.*	530
Browning *v.* Wright	2 Bos. & P. 13	*R.*	596, 597
Buckley *v.* Pirk	1 Salk. 316	*R.*	679
Burrell, *In re*	L.R. 7 Eq. 399		332
Burton's Settlement Trusts, *In re*	[1955] Ch. 60; [1954] 3 All E.R. 231	*Rev.*	349
Calvert *v.* Wainwright	[1947] K.B. 526; 63 T.L.R. 199; [1947] 1 All E.R. 282; 27 T.C. 475		286
Calvin's Case	7 Co.Rep. 1a	*R.*	565
Cameron *v.* Campbell & Worthington Ld.	[1930] S.A.S.R. 402	*R.*	184
Camille and Henry Dreyfus Foundation Inc. *v.* Inland Revenue Commissioners	[1954] 3 W.L.R. 167; [1954] 2 All E.R. 466		132
Camille and Henry Dreyfus Foundation Inc. *v.* Inland Revenue Commissioners	[1954] Ch. 672; [1954] 3 W.L.R. 167; [1954] 2 All E.R. 466	*R.*	475, 484
Caplin's Will, *In re*	2 Drew. & Sm. 527	*Dist.*	495, 497
Carey *v.* Metropolitan Borough of Bermondsey	20 T.L.R. 2		524
Carlton, *In re*	[1945] Ch. 372		197
Cavendish, *In re*	[1912] 1 Ch. 794	*Dist.*	2, 14, 15, 17
Cavendish-Bentinck *v.* Fenn; *In re* Cape Breton Co.	12 App.Cas. 652	*R.*	649
Central London Property Trust Ld. *v.* High Trees House Ld.	[1947] K.B. 130; 62 T.L.R. 559		604
Chamney *v.* Lewis	17 T.C. 318		460

Chaplin, *In re*	[1950] Ch. 507; 66 T.L.R. (Pt. 1) 1166; [1950] 2 All E.R. 155		257
Chapman *v.* Chapman	[1954] A.C. 429; [1954] 1 All E.R. 798; [1954] 2 W.L.R. 723	*C.*	260, 266, 267, 272, 281–3
Charrington & Co. Ld. *v.* Wooder	[1914] A.C. 71; 30 T.L.R. 176	*R.*	186
Chesterman's Trusts, *In re*	[1923] 2 Ch. 466		150
Cinema Press Ld. *v.* Pictures & Pleasures Ld.	[1945] K.B. 356; 61 T.L.R. 282; [1945] 1 All E.R. 440	*R.*	547
Church *v.* Brown	15 Ves. 258	*R.*	597
Churchill *v.* Churchill	L.R. 5 Eq. 44	*C.*	84, 98
Clavering *v.* Ellison	7 H.L.C. 707	*Appl.*	69, 76–8, 80
Clayton *v.* Ramsden	[1943] A.C. 320; 59 T.L.R. 75; [1943] 1 All E.R. 16	*R.*	500
Coburn *v.* Colledge	[1897] 1 Q.B. 702; 13 T.L.R. 321		523
Cohen, *In re*	[1911] 1 Ch. 37		93
Coleman *v.* Birmingham Overseers	6 Q.B.D. 615	*R.*	204
Coles *v.* Bank of England	10 A. & E. 437	*R.*	530, 531, 536, 544
Compton *v.* West Ham Borough Council	[1939] Ch. 771; 55 T.L.R. 827; [1939] 3 All E.R. 198		525
Constantinesco *v.* Rex	11 T.C. 730		288
Conyngham, *In re*	[1921] 1 Ch. 491; 37 T.L.R. 420		630
Cook *v.* Harris	1 Ld.Raym. 367	*R.*	680
Cooper *v.* Blakiston	[1909] A.C. 104; 25 T.L.R. 164; 5 T.C. 347	*C.*	285, 298–300, 302, 303
Copeland *v.* Stephens	1 B. & Ald. 593		667
Corbett *v.* Duff	[1941] 1 K.B. 730; 57 T.L.R. 429; [1941] 1 All E.R. 512; 23 T.C. 763		287
Cottam *v.* Eastern Counties Railway Co.	1 J. & H. 243	*Appl.*	509, 537
Coventry and Dixon's Case	14 Ch.D. 660	*R.*	649
Cowley (Earl) *v.* Inland Revenue Commissioners	[1899] A.C. 198; 15 T.L.R. 270	*C.*	128, 134, 136
Coxen, *In re*	[1948] Ch. 747; [1948] 2 All E.R. 492	*Appl.*	84, 94
Crawshay, *In re*	[1948] Ch. 123	*R.*	97, 100
Crosskill *v.* Bower	32 Beav. 86		151
Croxon, *In re*	[1904] 1 Ch. 252		73
Crystal Palace Co., *In re*	104 L.T. 898; 27 T.L.R. 413		688
Cummings *v.* London Bullion Co. Ld.	[1952] 1 K.B. 327; [1952] 1 All E.R. 383	*R.*	155
Dansk Rekylriffel Syndikat Aktieselskab *v.* Snell	[1908] 2 Ch. 127		547
David *v.* Sabin	[1893] 1 Ch. 523; 9 T.L.R. 240	*Appl.*	586, 597
Davies *v.* Gas Light and Coke Co.	[1909] 1 Ch. 708; 25 T.L.R. 428		518
Davis *v.* Harrison	43 T.L.R. 623; 11 T.C. 707	*R.*	299

Davis *v.* Bank of England	2 Bing. 393	*Appl.*	509, 528, 529, 531, 532, 544, 546
Debtor, A, *In re*	[1928] Ch. 199	*Dist.*	601, 612, 617, 618
Dendy *v.* Evans	[1910] 1 K.B. 263		331
Dick, *In re*	[1953] Ch. 343; [1953] 1 All E.R. 559	*R.*	95, 100
Dicks *v.* Yates	18 Ch.D. 76		547
Downshire Settled Estates, *In re*	[1953] Ch. 218; [1953] 1 All E.R. 103	*R.*	261, 266, 282
Drax, *In re*	94 L.T. 611; 22 T.L.R. 343		72
Dudgeon, *In re*	12 T.L.R. 465	*R.*	110
Dugdale *v.* Lovering	L.R. 10 C.P. 196	*R.*	548
Dunkirk Colliery Co. *v.* Lever	9 Ch.D. 20	*C.*	178, 185, 187
Dunlop Pneumatic Tyre Co. Ld. *v.* Actien-Gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.	[1902] 1 K.B. 342; 18 T.L.R. 229		113
Dutton *v.* Thompson	23 Ch.D. 278	*R.*	325, 327
E. *v.* E.	34 N.Z.L.R. 794	*R.*	209
Ealing Borough Council *v.* Minister of Housing and Local Government	[1952] 1 Ch. 856; [1952] 2 T.L.R. 490; [1952] 2 All E.R. 639		572
Edwards, *In re*	[1910] 1 Ch. 541; 26 T.L.R. 308		73
Edwards *v.* Hall	[1949] 1 All E.R. 352	*C.*	432, 437
Egg *v.* Blayney	21 Q.B.D. 107	*Appl.*	586, 599
Elborough *v.* Ayres	L.R. 10 Eq. 367	*Appl.*	364, 422, 429
Ellenborough, *In re*	[1903] 1 Ch. 697	*Dist.*	84, 103, 104
Ellesmere (Earl) *v.* Inland Revenue Commissioners	[1918] 2 K.B. 735; 34 T.L.R. 560		181
Elliott, *In re*	102 L.T. 528		109, 110
Ellis & Co.'s Trustee *v.* Dixon-Johnson	[1924] 1 Ch. 342; 40 T.L.R. 177		333
Embury, *In re*	109 L.T. 511	*F.*	139, 142, 143
Employers' Liability Assurance Corporation *v.* Sedgwick, Collins & Co.	[1927] A.C. 95; 42 T.L.R. 749	*R.*	118
Enoch and Zaretzky, Bock & Co.'s Arbitration, *In re*	[1910] 1 K.B. 327		265
Etic Ld., *In re*	[1928] Ch. 861	*Appl.*	635, 649, 655
Everitt *v.* Everitt	L.R. 10 Eq. 405	*R.*	325
Ewart *v.* Fryer	[1901] 1 Ch. 499; 18 T.L.R. 590	*Appl.*	328, 335, 339
Exmouth (Viscount), *In re*	23 Ch.D. 158		72
Fattorini (Thomas) (Lancashire) Ld. *v.* Inland Revenue Commissioners	[1942] A.C. 643; [1942] 1 All E.R. 619	*R.*	175
Featherstonhaugh *v.* Fenwick	17 Ves. 298	*R.*	337
Findon *v.* Parker	11 M. & W. 675	*R.*	376, 384, 399, 410
Firestone Tire and Rubber Co. (S.S.) Ld. *v.* Singapore Harbour Board	[1952] A.C. 452; [1952] 1 T.L.R. 1625; [1952] 2 All E.R. 219		523
Fischer *v.* Kamala Naicker	8 Moo.I.A. 170	*R.*	400
Fitzroy *v.* Cave	[1905] 2 K.B. 364; 21 T.L.R. 612	*R.*	384, 410
Forrest, *In re*	[1931] 1 Ch. 162	*R.*	578, 581
Foss, Bilborough, Plaskitt & Foss, *In re*	[1912] 2 Ch. 161		491
Foster *v.* Driscoll	[1929] 1 K.B. 470	*R.*	52
Fowkes *v.* Pascoe	L.R. 10 Ch. 343		197

Fowler *v.* Broad's Patent Night Light Company	[1893] 1 Ch. 724	*R.*	696
Fox, *In re*	[1913] 2 Ch. 75	*R.*	437, 438
Fraser, *In re*	[1913] 2 Ch. 224	*Appr.*	2, 13–15, 17
Fraser, *In re*	22 Ch.D. 827	*Appl.*	105, 109, 110
G., *In re, Ex p.* B.	44 S.J. 345	*R.*	614, 616, 619–21
Gammans *v.* Ekins	[1950] 2 K.B. 328		197
Gape, *In re*	[1952] Ch. 743; [1952] 2 T.L.R. 477; [1952] 2 All E.R. 579	*R.*	94
Gatti's Voluntary Settlement Trusts, *In re*	52 T.L.R. 674		63
Gatti's Voluntary Settlement Trusts, *In re*	52 T.L.R. 674; [1936] 2 All E.R. 1489	*R.*	355
Gestetner Settlement, *In re*	[1953] Ch. 672	*C.*	21, 32, 36
Gestetner Settlement, *In re*	[1953] Ch. 672; [1953] 1 All E.R. 1150	*Appl.*	495, 497–9
Gibbs *v.* Gibbs	[1952] P. 332; [1952] 1 T.L.R. 1143; [1952] 1 All E.R. 942		547
Gibson *v.* Barton	L.R. 10 Q.B. 329		638
Giles, *In re*	43 Ch.D. 391		264
Gillett's Will Trusts, *In re*	[1950] Ch. 102; 65 T.L.R. 727; [1949] 2 All E.R. 893	*F.*	577, 584, 702
Glenboig Union Fireclay Co. *v.* Inland Revenue Commissioners	12 T.C. 427		458
Glyn Will Trusts, *In re*	[1950] W.N. 373	*Appl.*	105, 108
Goldney *v.* Bower	(Unreported)	*R.*	537
Goodright *v.* Moss	2 Cowp. 591	*R.*	126
Gower *v.* Mainwaring	2 Ves.Sen. 87	*Dist.*	495, 497
Grand Junction Co. *v.* Bates	[1954] 2 Q.B. 160; [1954] 2 All E.R. 385	*R.*	339
Grant *v.* Lynam	4 Russ. 292	*R.*	33
Greaves, *In re*	[1954] Ch. 434	*R.*	58
Greig *v.* National Amalgamated Union of Shop Assistants, etc.	22 T.L.R. 274	*R.*	383, 409, 427
Griffiths *v.* Smith	[1941] A.C. 170; 57 T.L.R. 185; [1941] 1 All E.R. 66		519
H. B., *In re*	[1904] 1 K.B. 94		603
H.'s Settlement, *In re*	[1939] W.N. 318	*Appl.*	55, 57
Hall, *In re*	[1912] W.N. 175; 28 T.L.R. 480	*R.*	258, 259
Hall's Settlement, *In re*	[1954] 1 W.L.R. 1185; [1954] 2 All E.R. 679	*Aff.*	128
Hammersmith Corporation *v.* Boundary Commission for England	The Times, Dec. 15, 1954	*R.*	251
Hammersmith Borough Council *v.* Boundary Commission for England	The Times, Dec. 15, 1954		571
Hancock *v.* Watson	[1902] A.C. 14	*Dist.*	60, 64, 66–8
Hancock *v.* Watson	[1902] A.C. 14	*Appl.*	348, 349, 353, 354, 357, 359–61
Harding *v.* Glyn	1 Atk. 469	*R.*	33
Harland-Peck, *In re*	[1941] Ch. 182; 57 T.L.R. 118; [1940] 4 All E.R. 347		701

Harper *v.* Secretary of State for the Home Department	The Times, Dec. 18, 1954; [1955] Ch. 238; [1955] 1 All E.R. 331	*C.*	567, 573, 574
Harrington, *In re*	[1908] 2 Ch. 687; 25 T.L.R. 3	*R.*	208
Harrington (Earl) *v.* Derby Corporation	[1905] 1 Ch. 205; 21 T.L.R. 98		524
Hatch, *In re*	[1948] Ch. 592		63
Hatch, *In re*	[1948] Ch. 592; [1948] 2 All E.R. 288	*R.*	355
Hauxton Parochial Church Council *v.* Stevens	[1929] P. 240	*R.*	595
Hazeldine's Trusts, *In re*	[1908] 1 Ch. 34	*R.*	437, 438
Heath, *In re*	[1945] Ch. 417; 61 T.L.R. 554	*C.*	122, 126
Henderson *v.* James Louttit & Co. Ld.	21 Rettie 674	*Dictum N.F.*	144, 147
Herbert *v.* McQuade	[1902] 2 K.B. 631; 18 T.L.R. 728; 4 T.C. 489	*C.*	285, 294, 295, 301–3, 305
Herwin, *In re*	[1953] Ch. 701; [1953] 2 All E.R. 782		6
Hickman *v.* Peacey	[1945] A.C. 304		124
Hildyard *v.* South Sea Co. and Keate	2 P.Wms. 75		516
Hill *v.* Crook	L.R. 6 H.L. 265	*R.*	201, 203
Hillerns and Fowler *v.* Murray	17 T.C. 77		459
Hilton *v.* Woods	L.R. 4 Eq. 432	*R.*	423
Hinckes, *In re*	[1921] 1 Ch. 475		73
Holland, *In re*	[1914] 2 Ch. 595	*Appl.*	84, 99
Holden *v.* Thompson	[1907] 2 K.B. 489	*R.*	385, 411
Holland *v.* Fisher	O.Bridg. 181		442
Hookey, *Ex p.*, Risca Coal and Iron Co., *In re*	4 De G.F. & J. 456	*N.F.*	261, 268, 278
Houston *v.* Burns	[1918] A.C. 337	*R.*	33
Howell *v.* Falmouth Boat Construction Co.	[1951] A.C. 837; [1951] 2 T.L.R. 151; [1951] 2 All E.R. 278	*R.*	176
Humble *v.* Bowman	47 L.J.Ch. 62	*R.*	204
Humphreys *v.* Morten	[1905] 1 Ch. 739		332
Hungerford Market Co. *v.* City Steamboat Co.	3 E. & E. 365	*C.*	211, 224, 233, 235
Hunter *v.* Dewhurst	16 T.C. 605		288
Hutton *v.* Secretary of State for War	43 T.L.R. 106		245, 570
Inche Noriah *v.* Shaik Allie Bin Omar	[1929] A.C. 127; 45 T.L.R. 1	*R.*	325
India, The	33 L.J.P.M. & A. 193	*R.*	446
Inland Revenue Commissioners *v.* Broadway Cottages Trust.	[1954] 1 W.L.R. 659	*Aff.*	21
Inland Revenue Commissioners *v.* Butterley Co. Ld.	[1954] 1 W.L.R. 1199; [1954] 3 All E.R. 69	*Rev.*	453
Inland Revenue Commissioners *v.* Dowdall O'Mahoney & Co. Ld.	[1952] A.C. 401; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531; 33 T.C. 259	*R.*	484
Inland Revenue Commissioners *v.* Gas Lighting Improvement Co. Ld.	[1923] A.C. 723; 12 T.C. 503	C.	454, 472–3, 479, 486
Inland Revenue Commissioners *v.* Tootal Broadhurst Lee Co. Ld.	[1949] 1 All E.R. 261; 29 T.C. 352	*C.*	454, 472–3, 479, 486–7
James, *In re*	[1932] 2 Ch. 25	*D.*	189, 192

James *v.* Couchman	29 Ch.D. 212; 1 T.L.R. 305	*R.*	325
Janson *v.* Driefontein Consolidated Mines, Ld.	[1902] A.C. 484; 18 T.L.R. 796	*Appl.*	501, 505
Jauncey, *In re*	[1926] Ch. 471	*R.*	438
Joachimson *v.* Swiss Bank Corporation	[1921] 3 K.B. 110; 37 T.L.R. 534	*C.*	148, 155, 156
Johannesburg, The	[1907] P. 65		523
John Hudson & Co. Ld. *v.* Kirkness	[1954] 1 W.L.R. 40; [1954] 1 All E.R. 29		458
Johnson's Settlement Trusts, *In re*	[1943] Ch. 341		63
Johnstone *v.* Milling	16 Q.B.D. 460; 2 T.L.R. 249		152
Jones, *In re*	[1953] Ch. 125; [1953] 1 All E.R. 357	*R.*	94, 95
Jones, *In re*	[1945] Ch. 105	*R.*	32
Joslin, *In re*	[1941] Ch. 200; 57 T.L.R. 293; [1941] 1 All E.R. 302	*R.*	205, 208
Joyce *v.* Director of Public Prosecutions	[1946] A.C. 347; 62 T.L.R. 208; [1946] 1 All E.R. 186	*R.*	447
Joyce *v.* Director of Public Prosecutions	[1946] A.C. 347; 62 T.L.R. 208; [1946] 1 All E.R. 186		562, 566
Judgment Summons, A (No. 25 of 1952), *In re*, *Ex p.* Henlys Ld.	[1953] Ch. 1; [1952] 2 T.L.R. 681; [1952] 2 All E.R. 772; [1953] Ch. 195; [1953] 1 All E.R. 424	*Appl.*	601, 613, 621, 622, 624
Katherine et Cie Ld., *In re*	[1932] 1 Ch. 70	*R.*	697
Keighley, *In re*	[1919] 2 Ch. 388; 35 T.L.R. 491		496
Kempthorne, *In re*	[1930] 1 Ch. 268; 46 T.L.R. 15		701
Kepitigalla Rubber Estates Ld. *v.* National Bank of India Ld.	[1909] 2 K.B. 1010; 25 T.L.R. 402		525
Kersey, *In re*	[1952] W.N. 541	*R.*	75
King *v.* Henderson	[1898] A.C. 720; 14 T.L.R. 490	*R.*	622, 623
King *v.* King	15 Ir.Ch.R. 477	*R.*	96
Kingston Cotton Mill Co. (No. 2), *In re*	[1896] 2 Ch. 279; 12 T.L.R. 430	*Appl.*	635, 649, 650
Kirkland *v.* Peatfield	[1903] 1 K.B. 756; 19 T.L.R. 362	*R.*	437
Kleinwort, Sons & Co. *v.* Ungarische Baumwolle Industrie Aktiengesellschaft	[1939] 2 K.B. 678	*F.*	38, 52
Knox *v.* Gye	L.R. 5 H.L. 656	*R.*	543
Kotzias *v.* Tyser	[1920] 2 K.B. 69; 36 T.L.R. 194	*Dist.*	501, 506
Laing, *In re*	[1912] 2 Ch. 386		312
Lambe *v.* Eames	L.R. 6 Ch. 597	*R.*	205
Lamb, *In re*	[1929] 1 Ch. 722; 45 T.L.R. 190		701
Lancashire Loans Ld. *v.* Black	[1934] 1 K.B. 380	*Appl.*	318, 324, 325
Langlands, *In re*	87 L.J.Ch. 1		141
Lassence *v.* Tierney	1 Mac. & G. 551	*R.*	64, 67, 68, 360, 361
Lassence *v.* Tierney	1 Mac. & G. 551		89
Leeds Corporation *v.* Jenkinson	[1935] 1 K.B. 168; 51 T.L.R. 19	*R.*	170

Leigh *v.* Kent	3 Term R. 362	*R.*	446
Lesters Leather and Skin Co. *v.* Home and Overseas Brokers Ld.	[1948] W.N. 437; 64 T.L.R. 569		181
Lewes Sanitary Steam Laundry Co. Ld. *v.* Barclay & Co. Ld.	22 T.L.R. 737; 95 L.T. 444		577
Lewis' Will Trust, *In re*	[1951] 2 T.L.R. 1032; [1951] W.N. 591	*R.*	74
Lill *v.* Lill	23 Beav. 446	*R.*	315
Litt, *In re*	[1946] Ch. 154	*Dist.*	60, 67, 68
Litt, *In re*	[1946] Ch. 154; 62 T.L.R. 303; [1946] 1 All E.R. 314	*R.*	359
Littlewood *v.* George Wimpey & Co. Ld.	[1953] 2 Q.B. 501; [1953] 1 W.L.R. 426; 3 W.L.R. 553; [1953] 1 All E.R. 583; 2 All E.R. 915; [1954] 3 All E.R. 661		519
Liverpool and London and Globe Insurance Co. *v.* Bennett	6 T.C. 327		459
Liversidge *v.* Anderson	[1942] A.C. 206; 58 T.L.R. 35; [1941] 3 All E.R. 338		164
Llangattock, *In re*	33 T.L.R. 250		73
Lloyd *v.* Bowring	36 T.L.R. 397	*Dist.*	501, 506
Lockhart *v.* Hardy	9 Beav. 379		333
Lodge *v.* National Union Investment Co. Ld.	[1907] 1 Ch. 300; 23 T.L.R. 187		521
London Association of Shipowners and Brokers *v.* London and India Docks Joint Committee	[1892] 3 Ch. 242; 8 T.L.R. 717	*R.*	171
London Association of Shipowners and Brokers *v.* London and India Docks Joint Committee	[1892] 3 Ch. 242; 8 T.L.R. 717		220
London Joint Stock Bank Ld. *v.* Macmillan and Arthur	[1918] A.C. 777; 34 T.L.R. 509	*R.*	535
Lucas, *In re*	[1922] 2 Ch. 52	*N.F.*	105, 107–9
M'Donald *v.* Shand	1922 S.C. 555; 39 T.L.R. 444; 8 T.C. 420		286
Mace *v.* Cadell	1 Cowp. 232		444
Mackenzie-Kennedy *v.* Air Council	[1927] 2 K.B. 517; 43 T.L.R. 733		572
McKee, *In re*	[1931] 2 Ch. 145; 47 T.L.R. 424		702
McKee, *In re*	[1931] 2 Ch. 145; 47 T.L.R. 424		582
McManus *v.* Bowes	[1938] 1 K.B. 98; 53 T.L.R. 844; [1937] 3 All E.R. 227		525
Madeleine Vionnet et Cie. *v.* Wills	[1940] 1 K.B. 72; 56 T.L.R. 15; [1939] 4 All E.R. 136	*F.*	148, 154
Madrid, The	[1937] P. 40; 53 T.L.R. 237; [1937] 1 All E.R. 216		114
Marke Wood, *In re*	[1913] 2 Ch. 574	*E.*	2, 10, 15, 18, 19
Markwald *v.* Attorney-General	[1920] 1 Ch. 348; 36 T.L.R. 197	*Dist.*	559, 564, 565

Marrache *v.* Ashton	[1943] A.C. 311; 59 T.L.R. 142; [1943] 1 All E.R. 276		150
Marshall, *In re*	[1928] Ch. 661		62
Marshall & Co. *v.* Nicoll & Son	1919 S.C.(H.L.) 129	*C.*	178, 186
Martin, *In re*	[1955] 2 W.L.R. 1029; [1955] 1 All E.R. 865	*F.*	577, 583
Martin *v.* Holgate	L.R. 1 H.L. 175	*Dist.*	139, 142, 143
Mason & Risch Ld. *v.* Cristner	48 O.L.R. 8; 54 D.L.R. 653	*R.*	184
Master *v.* Miller	4 T.R. 320	*R.*	377, 401, 424
Master's Settlement, *In re*	[1911] 1 Ch. 321		312
Maund *v.* Mason	43 L.J.M.C. 62	*R.*	203
Medlock, *In re*	55 L.J.Ch. 738		630
Medway Oil and Storage Co. Ld. *v.* Continental Contractors	[1929] A.C. 88; 45 T.L.R. 20		547
Mercantile Trading Co., *In re*, Stringer's Case	L.R. 4 Ch. 475		638
Mercer and Moore, *In re*	14 Ch.D. 287	*R.*	691
Millensted *v.* Grosvenor House (Park Lane) Ld.	[1937] 1 K.B. 717; 53 T.L.R. 406; [1937] 1 All E.R. 736	*R.*	271, 280
Miller *v.* Collins	[1896] 1 Ch. 573	*R.*	438
Monk, *In re*	[1927] 2 Ch. 197		191
Moons Motors Ld. *v.* Kiuan Wou	[1952] 2 Lloyd's Rep. 80	*R.*	281
Morelle Ld. *v.* Wakeling	[1955] 2 Q.B. 379; [1955] 1 All E.R. 708	*Appl.*	665, 673–7, 679, 680, 682,
Morelle Ld. *v.* Waterworth	[1955] 1 Q.B. 1; [1954] 2 All E.R. 673	*Appl.*	664, 670–5, 677, 679–82
Morice *v.* Bishop of Durham	10 Ves. 522	*R.*	29
Morris *v.* Davies	5 Cl. & F. 163	*R.*	124
Morris *v.* Britannic Assurance Co. Ld.	[1931] 2 K.B. 125; 47 T.L.R. 318	*R.*	207
Mountain *v.* Bermondsey Borough Council	[1942] 1 K.B. 204; 58 T.L.R. 65; [1941] 3 All E.R. 498		525
Mowlem, *In re*	L.R. 18 Eq. 9	*R.*	631
Nakkuda Ali *v.* M. F. De S. Jayaratne	[1951] A.C. 66; 66 T.L.R. (Pt. 2) 214	*R.*	175
National Lead case	63 Federal Supplement 495, 534	*R.*	47
Neave, *In re*	[1938] Ch. 793; 54 T.L.R. 921; [1938] 3 All E.R. 220	*R.*	97
Nelson *v.* Hannam	[1943] Ch. 59; 59 T.L.R. 128; [1942] 2 All E.R. 680	*Appl.*	328, 336
Nesbitt *v.* Tredennick	1 Ball & B. 29	*R.*	337
Neville *v.* Kirby	[1898] P. 160		591
Neville *v.* London "Express" Newspaper Ld.	[1919] A.C. 368; 35 T.L.R. 167	*R.*	376, 379, 381, 386, 388, 406–8, 413, 414, 423–5, 428
Newcastle (Duke of) *v.* Worksop Urban Council	[1902] 2 Ch. 145; 18 T.L.R. 472	*C.*	211, 224, 233
Nicolene Ld. *v.* Simmons	[1953] 1 Q.B. 543; [1953] 1 All E.R. 822	*R.*	492–3

North-Eastern Gas Board *v.* Leeds Corporation	[1952] 2 T.L.R. 536		222
Northampton Corporation *v.* Ellen	[1904] 1 K.B. 299; 20 T.L.R. 168	*Dist.*	211, 224, 225, 233, 236
Norton, *In re*	[1949] W.N. 23		63, 66
Ogden (H. J.), *In re*	[1933] Ch. 678	*Appr.*	21, 33, 35, 36
Ogden, *In re*	[1933] Ch. 678; 49 T.L.R. 341	*R.*	499
Ogilby, *In re*	[1942] Ch. 288; 58 T.L.R. 209; [1942] 1 All E.R. 524	*R.*	258
Oliver *v.* Bank of England	[1901] 1 Ch. 652; 17 T.L.R. 286		516
Oram *v.* Hutt	[1914] 1 Ch. 98; 30 T.L.R. 55	*Dist.*	364, 378, 379, 405, 406, 408, 413–6, 418, 425
Orchard *v.* Simpson	2 C.B.N.S. 299		181
Ormond Investment Co. *v.* Betts	[1928] A.C. 143		132
Orton's Trust, *In re*	L.R. 3 Eq. 375	*N.F.*	139, 142, 143
Page *v.* Linwood	4 Cl. & F. 399		554
Palace Restaurants Ld., *In re*	[1914] 1 Ch. 492; 30 T.L.R. 248	*R.*	493
Palmer *v.* Young	1 Vern. 276	*R.*	337
Park, *In re*	[1932] 1 Ch. 580	*R.*	32
Park, *In re*	41 Ch.D. 326	*R.*	493
Parker *v.* London County Council	[1904] 2 K.B. 501; 20 T.L.R. 271	*R.*	541
Parrott, *In re*	[1946] Ch. 183; 62 T.L.R. 189; [1946] 1 All E.R. 321	*R.*	74
Payne, *In re*	[1927] 2 Ch. 1		63, 352
Peete, *In re*	[1952] W.N. 406; [1952] 2 T.L.R. 383		198
Pelly, *Ex p.*, *In re* Anglo-French Co-operative Society	21 Ch.D. 492	*R.*	649
Penny *v.* Pickwick	16 Beav. 246	*R.*	545
Perkins, *In re*	[1893] 1 Ch. 283		93
Perowne, *In re*	[1951] Ch. 785		197
Petty, *In re*	[1929] 1 Ch. 726		701
Phillips, *In re*	[1931] 1 Ch. 347	*R.*	56, 58
Playfair, *In re*	[1951] Ch. 4; 66 T.L.R. (Pt. 1) 1203		6
Pigg *v.* Clarke	3 Ch.D. 672	*R.*	174, 205
Plating Co. *v.* Farquharson	17 Ch.D. 49	*Appl.*	364, 382, 386, 408, 412, 415, 416, 426
Porter *v.* Freudenberg	[1915] 1 K.B. 857; 31 T.L.R. 162	*Appl.*	111, 120, 121
Portland (Duke of) *v.* Topham (Lady)	11 H.L.C. 32	*Appl.*	84, 100
Powell *v.* Kempton Park Racecourse Co.	[1899] A.C. 143; 15 T.L.R. 266	*C.*	441, 448
Powell *v.* Powell	[1900] 1 Ch. 243	*R.*	325
Prescott *v.* Birmingham Corporation	[1954] 3 W.L.R. 990; [1954] 3 All E.R. 698		163
Preston Banking Co. *v.* William Allsup & Sons	[1895] 1 Ch. 141	*R.*	271, 280
Price, *In re*	[1928] Ch. 579	*C.*	432, 436
Pride of Derby and Derbyshire Angling Association Ld. *v.* British Celanese Ld.	[1952] 1 T.L.R. 1013; [1952] W. N. 227; [1952] 1 All E.R. 1326		396

Prince Ernest of Hanover *v.* Attorney-General	[1955] Ch. 440; [1955] 1 All E.R. 746		561
Pritchard, *In re*	40 N.S.W.S.R. 443	*R.*	209
Pritchard *v.* Bettisfield Colliery Co.	[1925] 2 K.B. 284; 41 T.L.R. 551	*R.*	207
Pulleng *v.* Public Trustee	41 N.Z.L.R. 1022		209
Pyrmont Ld. *v.* Schott	[1939] A.C. 145; 55 T.L.R. 178; [1938] 4 All E.R. 713		150
Radcliffe *v.* Holt	11 T.C. 621		288
Rakestraw *v.* Brewer	2 P.Wms. 511	*R.*	337
Reg. *v.* Bank of England	[1920] 2 K.B. 47; 36 T.L.R. 144		519
Reg. *v.* Lords Commissioners of the Treasury	L.R. 7 Q.B. 387	*Dist.*	239, 253, 254
Reg. *v.* Lords Commissioners of the Treasury	L.R. 7 Q.B. 387		571
Rex *v.* Electricity Commissioners	[1924] 1 K.B. 171; 39 T.L.R. 715	*Dist.*	239, 252
Rex *v.* Electricity Commissioners	[1924] 1 K.B. 171		571
Rex *v.* Francis, *Ex p.* Markwald	[1918] 1 K.B. 617; 34 T.L.R. 273	*R.*	565
Rex *v.* St. Edmundsbury and Ipswich Diocese Chancellor	[1948] 1 K.B. 195; 63 T.L.R. 523; [1947] 2 All E.R. 170		593
Richardson *v.* Mellish	2 Bing. 229	*R.*	387
Riches *v.* Westminster Bank Ld.	[1947] A.C. 390; 63 T.L.R. 211; [1947] 1 All E.R. 469		458
Ridley, *In re*	[1950] Ch. 415; 66 T.L.R. (Pt. 1) 981; [1950] 2 All E.R. 1		701
Ritter *v.* Godfrey	[1920] 2 K.B. 47; 36 T.L.R. 144		547
Roach *v.* Trood	3 Ch.D. 429	*Appl.*	84, 98, 101
Roberts, *In re*	[1887] W.N. 231	*R.*	269, 280
Roberts *v.* Hopwood	[1925] A.C. 578; 41 T.L.R. 436	*C.*	211, 238
Robinson, *In re*	[1951] Ch. 198	*Appl.*	105, 109
Rowe, *In re*	[1941] Ch. 343; 57 T.L.R. 592; [1941] 2 All E.R. 330		701
Rucker *v.* Scholefield	1 H. & M. 36		63
Rushworth's Case	Freeman (Chan.) 13	*R.*	332, 337
Russell *v.* Russell	[1924] A.C. 687	*R.*	126
Russell (Inspector of Taxes) *v.* Scott	[1948] A.C. 422		132
Russian Commercial and Industrial Bank *v.* Comptoir d'Escompte de Mulhouse	[1923] 2 K.B. 630; 39 T.L.R. 561		151
Russian and English Bank *v.* Baring Bros. & Co. Ld.	[1932] 1 Ch. 435; 48 T.L.R. 193	*Appl.*	148, 158
Russian and English Bank and Guedalla *v.* Baring Bros. & Co.	[1936] A.C. 405; 52 T.L.R. 393; [1936] 1 All E.R. 505	*Appl.*	148, 157, 158
Russo-Asiatic Bank, *In re*	[1934] Ch. 720		152
Ryall *v.* Rowles	1 Atk. 164	*Appl.*	441, 450
Sabatier *v.* Trading Company	[1927] 1 Ch. 495	*Dist.*	111, 117–9
Sackvill *v.* Evans	Freem. 171	*R.*	669, 678
Sadler *v.* Pratt	5 Sim. 632	*R.*	97
Salusbury *v.* Denton	3 K. & J. 529	*Dist.*	21, 33, 34

Scales *v.* George Thompson & Co. Ld.	13 T.C. 83	*R.*	471
Scarisbrick, *In re*	[1951] Ch. 622	*Dist.*	21, 33
Serjeant *v.* Nash, Field & Co.	[1903] 2 K.B. 304; 19 T.L.R. 510	*R.*	335
Severn and Wye and Severn Bridge Railway Co., *In re*	[1896] 1 Ch. 559; 12 T.L.R. 262	*Dist.*	509, 544, 545
Seymour *v.* Reed	[1927] A.C. 554; 43 T.L.R. 584; 11 T.C. 625	*Dist.*	285, 293, 296–8, 300, 302, 309
Sharkey *v.* Wernher	[1954] Ch. 713; [1954] 3 W.L.R. 367; [1954] 2 All E.R. 753		257
Shaw, *In re*	83 L.T. 754	*R.*	611, 616, 619
Sheffield Corporation *v.* Barclay	[1905] A.C. 392; 21 T.L.R. 642	*R.*	548, 549
Short *v.* M'Carthy	3 B. & Ald. 626	*R.*	530
Short *v.* Poole Corporation	[1926] Ch. 66; 42 T.L.R. 107		163
Short *v.* Poole Corporation	[1926] Ch. 66; 42 T.L.R. 107	*R.*	234
Sibley *v.* Perry	7 Ves. 522		141
Sifton *v.* Sifton	[1938] A.C. 656; 54 T.L.R. 969; [1938] 3 All E.R. 435	*R.*	76, 94, 500
Simpson's Marriage Settlement, *In re*	[1952] Ch. 412; [1952] 1 T.L.R. 868; [1952] 1 All E.R. 963	*N.F.*	84, 96, 97, 100
Sinnett *v.* Herbert	L.R. 7 Ch. 232	*R.*	193
Skelton *v.* Baxter	[1916] 1 K.B. 321; 32 T.L.R. 130	*R.*	379, 421
Sloman *v.* Bank of England	14 Sim. 475	*Appl.*	509, 532, 542, 544, 546
Smeaton *v.* Ilford Corporation	[1954] Ch. 450; [1954] 1 All E.R. 923		394
Smith *v.* Cardiff Corporation	[1953] 3 W.L.R. 994; [1954] 1 Q.B. 210; [1953] 2 All E.R. 1373	*R.*	167
Standingford *v.* Probert	[1950] 1 K.B. 377		197
Staple of England, etc. *v.* Bank of England	21 Q.B.D. 160; 4 T.L.R. 46		520
St. Aubyn *v.* Attorney-General	[1952] A.C. 15; [1951] 3 All E.R. 473		131
St. Nazaire Co., *In re*	12 Ch.D. 88	*R.*	269, 280
Stewart *v.* Hansen	44 A.L.R. 340	*R.*	184
Stock *v.* Meakin	[1900] 1 Ch. 683; 16 T.L.R. 284	*Dist.*	586, 598
Stockdale *v.* Hansard	9 Ad. & El. 1		570
Stollery, *In re*	[1926] Ch. 284	*R.*	127
Stour & Co. *v.* Johnson	15 App.Cas. 203	*R.*	493
Stratford-upon-Avon Corporation *v.* Parker	[1914] 2 K.B. 562	*R.*	679
Strathcona (Lord) *v.* Inland Revenue Commissioners	1929 S.C. 800		131
Stroud *v.* Norman	Kay 313		90
Suarez (No. 2), *In re*	[1924] 2 Ch. 19		688
Suffield and Watts, *In re*	20 Q.B.D. 693		270, 271, 280, 281
Swan *v.* North British Australasian Co. Ld.	2 H. & C. 175	*R.*	535
Sykes *v.* Sykes	L.R. 3 Ch. 301	*Appl.*	577, 580, 581

Tailby *v.* Official Receiver	13 App.Cas. 523; 4 T.L.R. 726	*R.*	103
Talbot-Ponsonby's Estate, *In re*	[1937] 4 All E.R. 309; 54 T.L.R. 33	*R.*	95
Tarn *v.* Turner	39 Ch.D. 456		554
Tayler *v.* Great Indian Peninsula Railway Co.	4 De G. & J. 559		518
Taylor *v.* Midland Railway Co.	28 Beav. 287; 8 H.L.C. 751	*R.*	539, 546
Terrell *v.* Secretary of State for the Colonies	[1953] 2 Q.B. 482; [1953] 2 All E.R. 490		392
Thomas, *In re*	[1911] 2 Ch. 389	*R.*	277
Thompson, *In re*	[1936] Ch. 676; [1936] 2 All E.R. 141	*C.*	699, 704–6
Thompson, *In re*	[1936] Ch. 676; [1936] 2 All E.R. 141	*R.*	584
Tong, *In re*	[1931] 1 Ch. 202		701
Tredwell, *In re*	[1891] 2 Ch. 640	*R.*	315
Turburville *v.* West Ham Corporation	[1950] 2 K.B. 208; 66 T.L.R. (Pt. 1) 1155; [1950] 2 All E.R. 54		519
Turner *v.* Richardson	7 East 335	*R.*	681
Turton *v.* Cooper	21 T.L.R. 546; 5 T.C. 138	*R.*	300
Tynemouth Corporation *v.* Attorney-General	[1899] A.C. 293; 15 T.L.R. 370		220
Underhill *v.* Minister of Food	[1950] 1 All E.R. 591		245
United States of America *v.* Imperial Chemical Industries	U.S. District Court for the Southern District of New York [1952] Civil Action No. 24–13	*R.*	54
Vacuum Oil Co. Ld. *v.* Ellis	[1914] 1 K.B. 693		554
Vatcher *v.* Paull	[1915] A.C. 372	*C.*	84, 95, 100
Vic Mill Ld., *In re*	[1913] 1 Ch. 465	*Appl.*	178, 183, 184
Voisey, *Ex p.*	21 Ch.D. 442	*R.*	173
Wallis *v.* Duke of Portland	3 Ves.Jun. 494	*R.*	376, 378, 399, 402, 403, 424
Wallis *v.* Solicitor-General for New Zealand	[1903] A.C. 173		191
Walter's Will Trusts, *In re*	[1949] Ch. 91; [1949] 2 All E.R. 955		355
Wardens and Governors of Cholmeley School, Highgate *v.* Sewell	[1894] 2 Q.B. 906; 10 T.L.R. 509		332
Warman *v.* Seaman	Pollexfen 112		442
Watkins, *In re*	[1953] 1 W.L.R. 1323		198
Weld-Blundell *v.* Stephens	[1920] A.C. 956; 36 T.L.R. 640	*R.*	382
Wellesley *v.* Earl of Mornington	2 K. & J. 143	*R.*	99
Wertheim *v.* Chicoutimi Pulp Co.	[1911] A.C. 301		181
West Ham Guardians *v.* Churchwardens of St. Matthew, Bethnal Green	[1894] A.C. 230; 10 T.L.R. 375	*R.*	207
Western Counties Steam Bakeries and Milling Co., *In re*	[1897] 1 Ch. 617		638
Whitby, *In re*	[1944] Ch. 210; 60 T.L.R. 224; [1944] 1 All E.R. 299	*R.*	258

White, *In re*	[1916] 1 Ch. 172	*R.*	258, 259
White's Trusts, *In re*	33 Ch.D. 449; 2 T.L.R. 830	*R.*	193
Whiting, *In re*	[1913] 2 Ch. 1	*Dist.*	577, 580
Wickhambrook Parochial Church Council *v.* Croxford	[1935] 2 K.B. 417; 51 T.L.R. 424	*Appl.*	585, 594
Wild *v.* Simpson	[1919] 2 K.B. 544; 35 T.L.R. 576	*R.*	388, 421, 423
Wilkinson, *In re*	[1926] Ch. 842	*R.*	95
Wilkinson *v.* Adam	1 Ves. & B. 422	*R.*	201
Williams *v.* Bacon	1 Sim. & St. 415		589
Williams *v.* Bosanquet	1 Brod. & Bing. 238	*R.*	667, 680
Willis, *In re*	[1917] 1 Ch. 365		630
Wilson, *In re*	[1913] 1 Ch. 314		191
Wilson *v.* Duguid	24 Ch.D. 244	*Dist.*	21, 33
Wilson's Will Trusts, *In re*	[1950] W.N. 507	*R.*	94
Witham, *In re*	[1922] 2 Ch. 413	*R.*	438
Woking U. D. C. (Basingstoke Canal) Act, 1911, *In re*	[1914] 1 Ch. 300; 30 T.L.R. 135	*Dist.*	684, 692–4
Wollaston *v.* Hakewill	3 Man. & Gr. 297	*R.*	679
Woods, *In re*	[1931] 2 Ch. 138	*Dist.*	577, 580
Wood's Will Trusts, *In re*	[1952] Ch. 406; [1952] 1 T.L.R. 670; [1952] 1 All E.R. 740	*R.*	74, 94
Woolley, *In re*	[1903] 2 Ch. 206		140
Woolwich Union *v.* Fulham Union	[1906] 2 K.B. 240; 22 T.L.R. 579	*R.*	203, 206
Worthington, *In re*	[1933] Ch. 771; 49 T.L.R. 444		701
Wright, *In re*	[1954] Ch. 347; [1954] 2 W.L.R. 972	*D.*	189, 192
Wynne *v.* Fletcher	24 Beav. 430		72
Yates' Settlement Trusts, *In re*	[1954] 1 W.L.R. 564; [1954] 1 All E.R. 619	*R.*	267
Young *v.* Grote	4 Bing. 253	*Appl.*	509, 534, 535

STATUTES JUDICIALLY CONSIDERED

1601

Statute of Elizabeth I, 1601 (43 *Eliz.* 1, *c.* 4) **Roxburgh J. 104**

1705

Statute of 1705 (4 & 5 *Anne*, *c.* 16). **Vaisey J. 440**

1859

Queen's Remembrancer Act, 1859 (22 & 23 *Vict. c.* 21) **C.A. 664**

1888

Mortmain and Charitable Uses Act, 1888 (51 & 52 *Vict. c.* 42), s. 1 **C.A. 664**

1893

Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 50 (3) **Upjohn J. 177**

1894

Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 7 (5) **C.A. 128**

1903

Birmingham Corporation Act, 1903 (3 *Edw.* 7, *c. cxcii*), *s.* 31 **C.A. 210**

1914

Birmingham Corporation Act, 1914 (4 & 5 *Geo.* 5, *c. cvi*), *s.* 12 (1) **C.A. 210**

1918

Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 37 (1) (*b*) **C.A. 20**

—— —— *Sch. E*, *r.* 1 **C.A. 363**

1922

Hampshire Rivers Fisheries Provisional Order Confirmation Act, 1922 (12 & 13 *Geo.* 5, *c. cviii*), *Sch.*: *Hampshire Rivers Fisheries Provisional Order*, 1922, *cl.* 17 **Vaisey J. 341**

1923

Salmon and Freshwater Fisheries Act, 1923 (13 & 14 *Geo.* 5, *c.* 16), *ss.* 61, 93 (2). **Vaisey J. 341**

1925

Administration of Estates Act, 1925 (15 & 16 *Geo.* 5, *c.* 23), *ss.* 33 (1), (2), (7), 34 (1), (3), *Sch.* 1, *Part II*, *paras.* 1, 2 **Danckwerts J. 698**

—— —— *s.* 34 (3), *Sch.* 1, *para.* 1 **Harman J. 576**

—— —— *ss.* 46, 55 (1) (*x*) **Danckwerts J. 253**

Law of Property Act, 1925 (15 & 16 *Geo.* 5, *c.* 20), *ss.* 40 (1), 205 (1) (*ix*) (*x*). **C.A. 431**

—— —— *ss.* 130 (1), 175 (1) **Wynn Parry J. 627**

—— —— *s.* 146 (4) **Upjohn J. 328**

—— —— *Sch.* 11 **Wynn Parry J. 585**

1930

Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *ss.* 72, 104 **C.A. 210**

1931

Agricultural Marketing Act, 1931 (21 & 22 *Geo.* 5, *c.* 42), *s.* 1 (8) **Upjohn J. 567**

1936

Housing Act, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 51), *ss.* 83 (1), 85 (5), (6) **Danckwerts J. 159**

1937

Finance Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 54), *Sch. IV*, *para.* 7 **C.A. 453**

1938

Inheritance (Family Provision) Act, 1938 (1 & 2 *Geo.* 6, *c.* 45) **Harman J. 194**

1939

Limitation Act, 1939 (2 & 3 *Geo.* 6, *c.* 21), *ss.* 2, 21 **Harman J. 508**

1940

Finance Act, 1940 (3 & 4 *Geo.* 6, *c.* 29), *s.* 55 **C.A. 128**

1942

Finance Act, 1942 (5 & 6 *Geo.* 6, *c.* 21), *s.* 47 **Harman J. 508**

1946

Coal Industry Nationalization Act, 1946 (9 & 10 *Geo.* 6, *c.* 59), *ss.* 19, 22 (2) (3) (4) **C.A. 453**

1947

Burma Independence Act, 1947 (11 & 12 *Geo.* 6, *c.* 3), *s.* 2 (1), *Sch. I*, *paras.* 1, 2 (2) **Vaisey J. 558**

Crown Proceedings Act, 1947 (10 & 11 *Geo.* 6, *c.* 44), *ss.* 2, 17, 21 **Upjohn J. 567**

—— —— *s.* 21 **C.A. 238**

Finance Act, 1947 (10 & 11 *Geo.* 6, *c.* 35), *ss.* 31, 32, 43 **C.A. 453**

1948

British Nationality Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 56), *Sch.* 4, *Part II.* **Vaisey J. 440**

Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 323 - - **Wynn Parry J. 683**

—— —— *ss.* 333 (1), 455 - - **C.A. 634**

—— —— *ss.* 406, 412 - - - **C.A. 111**

1949

Coal Industry (*No.* 2) *Act*, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 79), *s.* 1 (2) - **C.A. 453**

House of Commons (*Redistribution of Seats*) *Act*, 1949 (12 *&* 13 *Geo.* 6, *c.* 66), *ss.* 2, 3; *Sch.* 11, *rr.* 1, 4, 5, 6. **C.A. 238**

1952

Intestates' Estates Act, 1952 (15 *&* 16 *Geo.* 6, *&* 1 *Eliz.* 2, *c.* 64) - **Harman J. 194**

1954

Birmingham Corporation Act, 1954 (2 *&* 3 *Eliz.* 2, *c. xliv*), *ss.* 51, 55 - **C.A. 210**

INDIA

1852

Indian Naturalization Act (*XXX of* 1852) **Vaisey J. 558**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Government Stock Regulations, 1943 (*S.R. & O.*, 1943, *No.* 1), *reg.* 2 **Harman J. 508**

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL

In re RYDON'S SETTLEMENT.
BARCLAYS BANK LD. *v.* EVERITT AND OTHERS.

[1953 R. No. 2762.]

C. A.

1954
July 14, 15.

Evershed M.R.,
Jenkins and
Hodson L.JJ.

Settlement — After-acquired property — Marriage settlement — To be settled "upon the trusts" declared of other fund—Whether funds amalgamated—Accretion—Hotchpot provision—Effect—Wife's will —Appointment of "wife's trust fund"—Whether after-acquired property included.

Trust—Trust funds—Consolidation—Accretion. Hotchpot.

By her marriage settlement made in 1890 a wife brought into settlement a sum of £3,000 therein defined as "the wife's trust "fund," which sum was settled in common form, after the death of the survivor of the husband and wife, in trust for the children and remoter issue of the marriage as the wife should appoint. The settlement further provided that, until certain reversionary interests settled by the husband should fall into possession, the sum of £150 should be raised every six months out of the investments representing the wife's trust fund and paid to the husband. On the falling in of the husband's reversionary interests the sums so raised were to be recouped to the wife's trust fund. The wife covenanted to convey to the trustees of the settlement after-acquired property, and it was provided that the trustees should stand possessed of such after-acquired property "upon the trusts . . . hereinbefore declared con-"cerning money forming part of the wife's trust fund (except the "special provisions hereinbefore contained as to half-yearly sales "and application of the proceeds of sale thereof)."

The wife, by her will, after referring to the settlement, and to the "divers trust funds and property therein and hereinafter "shortly referred to as 'the wife's trust fund'" appointed "the "wife's trust fund" in favour of a granddaughter and her issue. The wife died in 1941. A reversionary interest, which had been caught by the after-acquired property clause, fell into possession in 1953.

Roxburgh J. held that the appointment in the wife's will was limited to the investments representing the £3,000 originally settled and the reversionary interest devolved in default of appointment. On appeal:—

Held (1) that, since there was no rule of law that it was impossible to have a coalescence of two funds subject to a charge peculiar to one of such funds, on the true construction of the settlement the effect of the after-acquired property clause was to consolidate and amalgamate after-acquired property with the £3,000 originally settled, so that the expression "the wife's trust fund" in the settlement comprehended not only the original £3,000 but also after-acquired property.

In re Fraser [1913] 2 Ch. 224 approved, and observations of Cozens-Hardy M.R. in *In re Marke Wood* [1913] 2 Ch. 574 explained.

In re Cavendish [1912] 1 Ch. 794 distinguished.

(2) That on the true construction of the wife's will, the appointment of "the wife's trust fund" included after-acquired property as well as the originally settled £3,000.

Decision of Roxburgh J. reversed.

APPEAL from a decision of Roxburgh J.

By a marriage settlement dated January 21, 1890, made between Arthur Hope Rydon (the husband), Mrs. Rydon (hereinafter called the wife), who was then Jane or Jennie Palles (the niece of Palles C.B.) of the second part, Palles C.B. of the third part, and a trustee, of the fourth part, the husband brought into the settlement certain reversionary interests to which he was entitled under his father's will. The reversions were to fall in after the death of the testator's wife and the payment off of certain mortgages. That date was referred to in the settlement as the testator's time of division. In addition to these reversionary interests, the husband settled a policy of £1,000.

On the wife's behalf there was brought into settlement the sum of £3,000, which was provided by her uncle, the Chief Baron. Apart from the income of the £3,000, part of which was liable to be applied in keeping up the husband's policy, the settlement was one under which no income could be expected to arise until the testator's time for division.

The settlement provided with regard to the £3,000 that the trustees should stand possessed thereof "and the investments "for the time being representing the same (which sum and "investments are hereinafter referred to as 'the wife's trust "'fund') and also of the income of the wife's trust fund on trust "in the first place out of the income of the wife's trust fund "from time to time until the testator's time of division shall "arrive to pay the premiums on the said policy hereby assigned "and subject to such payment upon trust to pay the income of "the wife's trust fund" to her during her life, without power of anticipation, and after her death, to hold it, in effect, on protective trusts for the husband for his life.

It was provided that, from and after the death of the survivor of the husband and wife, "the capital and income of the wife's "trust fund shall be held in trust" for the children or remoter issue of the wife at such ages or times and if more than one in such shares as the wife should by deed or will or codicil appoint and, in default of any appointment by her, as the husband, if he should survive her, should appoint, with a trust in default for all or any of the children or child of the marriage who being sons should attain 21 or being daughters should attain that age or marry and if more than one in equal shares. Common form advancement and hotchpot provisions followed, and there were ultimate trusts to take effect in the event of failure of issue of the marriage.

The settlement contained a provision, relating to what were referred to in various parts of the settlement as "the half-yearly "sales," in the following terms: "Provided always and it is "hereby agreed and declared that notwithstanding anything "hereinbefore contained in case the said intended marriage shall "be solemnized the trustees or trustee shall at the expiration of "six calendar months from the date of the said marriage if" the husband and wife "shall be either of them then living sell so "much of the securities for the time being representing the said "sum of £3,000 now in the hands of the above-named trustee as "will raise as nearly as may be to the sum of £150 and shall pay "the money so raised to" the husband "if he be then living or "if he be then dead to" his wife "and at the expiration of every "subsequent period of six calendar months the trustees or trustee "shall so long as" the husband or wife "or one of them shall be "living and the testator's time of division shall not have arrived "make a similar sale and payment until by means of such half-"yearly sales and payments the whole of the capital originally

C. A.
1954

RYDON'S SETTLEMENT, *In re.* BARCLAYS BANK LD. *v.* EVERITT.

"constituting or representing the said sum of £3,000 shall have "been exhausted."

There was a provision for keeping up the policy out of capital, and the settlement proceeded: "Provided nevertheless and it is "hereby declared that in case before such capital shall have been "so exhausted either the longer living of them the said" husband and wife "shall die or the testator's time for division shall arrive "then upon and as from such date or the arrival of the testator's "time of division (whichever shall first happen) the foregoing "provisions as to half-yearly sales of capital and payment of the "proceeds thereof shall cease to be operative and shall no longer "be acted upon in any way."

Then it was provided that out of the first money which the trustees should receive in respect of the reversionary interests they should set apart a sum and "shall hold the sum so set apart "upon the trusts and with and subject to the powers and provisions hereinbefore declared and contained concerning the said "sum of £3,000 now in the hands of the above-named trustees "(other than and except the foregoing special provisions as to "half-yearly sales and payments of and out of capital) or such of "the said trusts powers and provisions (other than and except as "last aforesaid) as shall for the time being be subsisting or "capable of taking effect to the intent that by means of such "setting apart and holding the capital withdrawn from the wife's "trust fund by the said half-yearly sales of and payments out of "capital may be replaced for the benefit of the persons interested "hereunder in the wife's trust fund and the income thereof."

The settlement contained an after-acquired property clause as follows: "And it is hereby agreed and the" wife "hereby "covenants with the above-named trustees that if she should at "the time of the now intended marriage be or if at any time or "times during her now intended coverture she should become "entitled in any manner and for any estate or interest to any "real or personal property of the value of £300 or upwards at one "time and from one and the same source . . . then and in every "such case she . . . will . . . convey such real and personal "property to the trustees or trustee upon trust to sell . . . and "it is hereby agreed that the trustees or trustee shall stand "possessed of the money to arise from such sale . . . upon the "trusts and subject to the powers and provisions hereinbefore "declared concerning money forming part of the wife's trust fund "(except the special provisions hereinbefore contained as to half-

" yearly sales and application of the proceeds thereof) or as near " thereto as circumstances will permit. . . ."

The husband died on July 16, 1930. The wife, by clause 3 of her will, dated November, 1938, provided: " Whereas under " or by virtue of the settlement (hereinafter called ' the said " ' settlement ') made on my marriage with my late husband " dated the 21st day of January 1890 . . . divers trust funds " and property therein and hereinafter shortly referred to as " ' the wife's trust fund ' are settled in trust after the death of " the survivor of myself and my husband the said Arthur Hope " Rydon for all or such one or more exclusively of the other or " others of the issue of the marriage of my said husband and " myself whether children or remoter issue at such age or time or " respective ages or times and if more than one in such shares " and manner as I may by deed revocable or irrevocable or by " will or codicil appoint now in exercise of the power for this " purpose given to me by the said settlement and of all other " powers (if any) enabling me in this behalf I hereby direct and " appoint that the trustees or trustee for the time being of the " said settlement shall from and after my death stand possessed " of the wife's trust fund in trust for my grand-daughter Elizabeth " Susan Everitt if she shall be living at my death and shall then " have attained or shall thereafter attain the age of 21 years or " shall at my death have been married or shall thereafter marry " under that age." Then the wife settled the fund appointed to Elizabeth Susan Everitt, on her and her children.

The wife died on January 13, 1941. There had been two children of her marriage, a daughter, Eleanora Mary Rydon, who had married Stuart Oswald Everitt, the first defendant. She died intestate on August 21, 1933, and her estate was represented by her husband, the first defendant. The wife's second child, a son, Harold Edwin Rydon, was the second defendant. The first and second defendants together were entitled to any part of the settled property which went in default of appointment. The deceased daughter, Mrs. Everitt, had had two children, one being Elizabeth Susan Everitt, the appointee in clause 3 of the wife's will. Elizabeth Susan Everitt had married and had become Elizabeth Susan Somers, the third defendant. She had had one child, Cordelia Somers, the fourth defendant, an infant.

At the time of the wife's death the funds brought into the settlement by her comprised the investments representing the original £3,000 settled by her and a reversionary interest which had accrued in point of title on January 22, 1925, but did not fall into possession until 1953.

Barclays Bank Ld., as sole trustee of the settlement, applied to have it determined whether the appointment contained in the wife's will was limited to the investments representing the original £3,000, or also included the reversionary interest caught by the after-acquired property clause. Roxburgh J. held that the appointment was an appointment exclusively of the investments representing the original £3,000 and the reversionary interest devolved in default of appointment.

The fourth defendant, the infant Cordelia Somers, appealed.

Geoffrey Cross Q.C. and *W. J. C. Tonge* for Cordelia Somers. The question is whether the wife's after-acquired property accrued to the wife's trust fund or whether there is a separate settlement of such after-acquired property upon equivalent trusts. Roxburgh J. would have held that there was accruer had the trusts of the after-acquired property not excluded the special provisions for half-yearly sales of capital. He considered that, before there could be accruer, the trusts on which the after-acquired property was held must be precisely the same as the trusts of the original fund. There was no evidence whether in fact there was any right of recoupment in respect of the wife's trust fund at the date when she made her will. If there was such a right then existing, the trustees should have put in evidence on the point: *In re Herwin.*[1] The hotchpot clause in the settlement must apply to the wife's fund and to after-acquired property as a composite fund. This was the construction of Sargant J. in *In re Fraser.*[2] On any other construction advances would have to be brought into account more than once. [Reference was made to *In re Playfair, decd.*[3] and *In re Marke Wood.*[4]]

Denys Buckley for the first defendant. The court has to discover the intention of the parties from the documents. It must not, in construing the wife's will, start with any presumption that she intended to execute all powers vested in her to the fullest extent open to her. On the construction of the settlement referential trusts are declared in respect of after-acquired property. Such property is not amalgamated with the wife's original trust fund. The fact that the provisions for raising capital do not apply to after-acquired property shows that no amalgamation was intended. The observations of Cozens-Hardy M.R. in *In re Marke Wood*[5] show that if the trusts of two funds are different the doctrine of accretion cannot apply. The provisions of an after-acquired property clause will not be construed as modifying the earlier provisions of a settlement. The wording of this after-acquired property clause is very similar to that which was considered by Parker J. in *In re Cavendish*,[6] where he held that a referential trust was created and that there was no coalescence of after-acquired property with property originally settled. In the present case the fact that the hotchpot clause might have to be applied twice would not produce great inequality since the original wife's fund was only £3,000. If it is held that on the true construction of the settlement the after-acquired property was amalgamated with the original fund, it is submitted that on the true construction of the wife's will the appointment she made only extended to her original fund.

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[1] [1953] Ch. 701; [1953] 2 All E.R. 782.

[2] [1913] 2 Ch. 224.

[3] [1951] Ch. 4; 66 T.L.R. (Pt. 1) 1203; [1950] 2 All E.R. 285.

[4] [1913] 2 Ch. 574.

H. A. Rose for the plaintiff bank.

Jenkins L.J., giving judgment first, stated the facts, read the documents and continued: Those being the documents, I come to the question whether the appointment contained in clause 3 of the will of the wife operated upon the interest caught by the after-acquired property clause or was confined to the £3,000 originally brought into settlement on the wife's behalf. I think that this question may be conveniently divided into two: first, whether, on the true construction of the settlement, the expression " the wife's trust fund " should be treated as describing and comprehending not merely the original £3,000 but also any additions to the settlement brought about by the operation of the after-acquired property clause, and, secondly, whether, even if the expression " the wife's trust fund " is not a strictly accurate description, according to the terms of the settlement, of the whole fund consisting of the £3,000 and any additions thereto under the after-acquired property clause, nevertheless upon the true construction of the will, Mrs. Rydon did effectively exercise her power both over the original fund and the fund representing the after-acquired property, although she did so by perhaps not wholly accurate language.

I propose to deal first with the former of those questions; that is to say, whether, on the true construction of the settlement, the expression " the wife's trust fund " can be properly held to

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[5] [1913] 2 Ch. 574, 584.

[6] [1912] 1 Ch. 794.

C. A.
1954

RYDON'S SETTLEMENT, *In re.*
BARCLAYS BANK LD.
v.
EVERITT.

Jenkins L.J.

include the after-acquired property. As to that, Mr. Buckley, on behalf of those interested in default of appointment, places great reliance on the passage in the settlement which in so many words described the wife's trust fund as " the said sum of £3,000 " and the investments for the time being representing the same " (which sum and investments are hereinafter referred to as " ' the wife's trust fund ')." He says with force that this passage provides a clear and unequivocal meaning for the expression " the " wife's trust fund " and makes it denote the £3,000 and the investments representing that sum and nothing more. On the other hand, Mr. Cross, for the infant appellant, while not disputing—indeed, it would be impossible for him to dispute—the clear meaning of the passage which I have just read, says that nevertheless, if this settlement is looked at as a whole, the true conclusion is that any property added to the settlement by virtue of the after-acquired property clause should be treated as becoming part of and as included in the expression " the wife's trust " fund."

The arguments on which Mr. Cross relies are briefly these: first, going to the after-acquired property clause itself, he calls attention to the form in which the trusts of that property are declared. It is to be held " upon the trusts and subject to " the powers and provisions hereinbefore declared concerning " money forming part of the wife's trust fund." Mr. Cross observes that the direction is not to hold the property on the same trusts or on similar trusts or on like trusts; it is to hold it " upon " *the* trusts and subject to *the* powers and provisions hereinbefore " declared concerning money forming part of the wife's trust " fund." Those words, he says, are apt to describe an augmentation of the property subject to the existing trusts, rather than the creation of a new and distinct trust of additional property by reference to the existing trusts. He also places some reliance on the provisions about the half-yearly sales. He points out, as to those provisions, that the settlement there does not use the expression " the wife's trust fund," but uses the expression " the said sum " of £3,000 now in the hand of the above-named trustees." He relies upon that change of language as showing that it was contemplated that the sum of £3,000 would or might be only a part of the total fund or investments comprised at any given time in the wife's trust fund.

Speaking for myself, I cannot attach any great weight to that argument. I find Mr. Buckley's answer to it convincing, and it seems to me that, having regard to the nature of the operation contemplated, the appropriate reference was to "the said sum "of £3,000" as distinct from a reference to "the wife's trust "fund," whether or not property caught by the after-acquired property clause was to be treated as falling within the description "the wife's trust fund." It will be remembered that the provisions as to the half-yearly sales contemplated a half-yearly raising of £150 out of capital to be carried out until, to put it shortly, the arrival of the testator's time of division or the death of the survivor of Mr. and Mrs. Rydon. That process was to go on, subject to the time limit I have mentioned, until the fund was wholly exhausted, and it then was to cease; but, as will be remembered, there was a provision for recoupment out of the first money received by the trustees from the property brought into settlement by Mr. Rydon. That being the nature of the scheme, it would clearly have been inappropriate here to use the expression "the wife's trust fund," for "the wife's trust fund" would include not merely the sum of £3,000 out of which the half-yearly payments of £150 were to be made, but it would also include what I may describe as the right to recoupment or the sums actually recouped, under the provision as to such recoupment, and it would be wholly inappropriate, because it was obviously not intended—indeed, it was expressly provided that it was not intended—that the provision for the half-yearly payment should extend to anything beyond the original sum of £3,000.

I think that there is force, too, in Mr. Buckley's argument that, if the reference to the sum of £3,000 in the provisions about half-yearly payment was put in advisedly as a deliberate reference to part only of the trust fund, then, when one comes to the covenant to settle after-acquired property, the exception from the trusts which are to be applicable to the property, "special provisions hereinbefore contained as to half-yearly sales "and application of the proceeds thereof," would be otiose and inappropriate, for ex hypothesi these provisions were to apply only to a defined sum of £3,000. I cannot, for my part, attach any great weight one way or the other to the arguments addressed to the court concerning that provision.

To my mind, however, assistance is to be derived from it in a different way. In order to appreciate that, it is necessary to return for a moment to the after-acquired property clause. A point was made by Mr. Buckley (and it was the point, I think, which the judge considered decisive) to this effect: it is true that the clause provides that the after-acquired property is to be held "upon the trusts and subject to the powers and provisions

C. A.
1954

RYDON'S SETTLEMENT, *In re.* BARCLAYS BANK LD. *v.* EVERITT.

Jenkins L.J.

"hereinbefore declared concerning money forming part of the "wife's trust fund," but that is followed by the exception of "the special provisions hereinbefore contained as to half-yearly "sales and application of the proceeds thereof." Now, Mr. Buckley says that, even if the frame of the trust is appropriate to bring about an amalgamation of the after-acquired property with the original fund, nevertheless it is prevented from having that effect by the exception, for (he submits) there can be no consolidation of two funds unless the trusts of the two funds said to be amalgamated are identical. By excepting the special provisions as to half-yearly sales, the settlement has manifested an intention that there is to be no amalgamation, for, so long as the provisions as to half-yearly sales remain in force, the position would be, after the so-called amalgamation, that the £3,000 or the unexpended balance of it for the time being would be subject to a trust to raise £150 half-yearly out of the capital of the £3,000 and pay it to Mr. Rydon, if living, and after his death, to Mrs. Rydon. That would be a special trust applicable exclusively to the original fund and not to the fund represented by the after-acquired property.

Mr. Buckley cites, in support of that contention, *In re Marke Wood*,[1] for certain passages from the judgment of Cozens-Hardy M.R. He said[2]: "In my opinion there is no law and no pre-"sumption applicable to a case of this kind. It depends, in my "opinion, upon the true meaning and effect of the will as a "whole." Then he said: "If separate trustees might have "been appointed of these funds there would be no coalescence; "one could not be deemed to be an accretion to the other. If "separate trustees had been appointed I know of no process "of law by which the one set of trustees could be required to "hand over the funds to another set, although the beneficiaries "might be the same"; and later[3]: "Let me repeat an illustra-"tion which I suggested in argument. A very common form "of will is a devise of freeholds to trustees upon trust to sell "and to hold the proceeeds of sale upon settlement trusts. You "do not include copyholds because you want to save the expense "of admission, and so on; you have separate clauses and a direc-"tion to sell the copyholds and to hold the proceeds upon the "trusts thereinbefore declared with reference to the proceeds of "sale of the freeholds. I should have thought there, unless there

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[1] [1913] 2 Ch. 574.
[2] Ibid. 583.
[3] Ibid. 584.

"were some express words in the will, that that would be an "accretion and the hotchpot clause and everything else would "be applicable; but if there is any difference in the trusts at "any stage, speaking for myself, I am not prepared to hold "that the doctrine of accretion can apply."

Mr. Buckley uses the last two passages which I have quoted by saying here that the difference in the shape of the trust for the half-yearly sales in the present case would have enabled separate trustees to be appointed of the original fund, on the one hand, and the fund represented by the after-acquired property, on the other; and further, by adopting Cozens-Hardy M.R.'s view, that if there was any difference in the trusts at any stage, "speaking for myself, I am not prepared to hold that the "doctrine of accretion can apply." Here, he says, there is a difference in the respect which I have mentioned. But I conceive that there is no rule of law that it is impossible to have a coalescence of two funds, subject to a charge peculiar to one of such funds; and a difference, such as that occasioned by the exception in the present case, can really do no more than throw light upon the intention of the parties and, for what it is worth, it may be some indication against an intention to consolidate the two funds into one. Speaking for myself, I should not have thought that Cozens-Hardy M.R., when he referred to "any "difference," meant to refer to a difference such as this. In the case before him, there was a settlement of three separate funds on each of the testator's three children. There was no question of any one or two of those funds being held on the same trusts as the other or others, except in the event of the failure of the primary trust declared concerning the fund in question. There is nothing of that sort in the present case. There was simply an annual sum raisable out of capital, and it was desired to limit that raising of sums out of capital to the original fund. I see no reason, speaking for myself, for regarding a difference of that kind as fatal to the implication of an intention to amalgamate the two funds.

I now return to the passage concerning the recoupment of the amounts raised by means of the yearly sales, and I note again that it is in these terms: the trustees are to set apart a sum, broadly speaking, representing the amount by which the £3,000 has been depleted, and they are to hold the sum so set apart "upon the "trusts and with and subject to the powers and provisions here-"inbefore declared and contained concerning the said sum of "£3,000 now in the hands of the above-named trustees (other

C. A.
1954

Rydon's Settlement, *In re.* Barclays Bank Ld. *v.* Everitt.

Jenkins L.J.

" than and except the foregoing special provisions as to half-" yearly sales and payments of and out of capital) or such of the " said trusts powers and provisions (other than and except as " last aforesaid) as shall for the time being be subsisting or " capable of taking effect to the intent that by means of such " setting apart and holding the capital withdrawn from the wife's " trust fund by the said half-yearly sales of and payments out " of capital may be replaced for the benefit of the persons " interested hereunder in the wife's trust fund and the income " thereof."

Now, I attach considerable importance to that passage for these reasons: it was manifestly intended that the sum set apart by way of recoupment under these provisions was to coalesce with and form part of the wife's trust fund for all purposes. I think that that is undoubted; yet, in conjunction with that undoubted intention to effect a complete consolidation, one has the very words of exception relied on to prevent consolidation where they occur in the after-acquired property clause, viz.: " upon the trusts hereinbefore declared and contained concerning " the said sum of £3,000," and so on, " (other than and except " the foregoing special provisions as to half-yearly sales and pay-" ments of and out of capital)." It is true that the passage introduced by the words " to the intent " expressly states the intention of the operation to be the replacement of capital for the benefit of the persons interested in the wife's trust fund, but, nevertheless, the draftsman used the formula " upon the " trusts and with and subject to the powers and provisions " hereinbefore declared and contained concerning the said sum " of £3,000," as appropriate to bring about such a consolidation, and he did not consider the exception of the special provisions as to half-yearly sales as in any way repugnant to or inconsistent with such consolidation. That, speaking for myself, seems to be the most important feature for the purposes of the question now to be decided that can be extracted from the provisions about special sales.

I should next refer to the hotchpot clause, upon which considerable reliance was placed by Mr. Cross. It is in a usual form. The point is that, as it stands, its effect is that any child who or whose issue takes part of either of the two funds (that is to say, the husband's trust fund or the wife's trust fund) must bring the amount appointed into hotchpot (that is to say, account for it) in the division of either of those funds. So long as there are only two funds, says Mr. Cross, all is well; but suppose it is concluded that there is no consolidation between the wife's trust fund as originally constituted and the after-acquired property, he says that the hotchpot provision becomes unworkable or would, at all events, produce unfair and capricious results.

To my mind, there is considerable force in that argument, which commended itself to Sargant J. in *In re Fraser*.[4] The actual point at issue in that case was the effect of an after-acquired property clause on a hotchpot provision. The judge said[5]: "I "think that would be contrary to the general understanding of the "profession, and I feel sure that in numberless cases, where "funds have from time to time fallen in under after-acquired "property clauses, there have been distributions of the original "fund and the 'accreted fund'—of course, I am using a word "there which begs the question in my favour, so I will say the "fund which comes in in that way—on the footing that the "appointments which have been made of the original fund before "the other funds fell in had to be taken into account under a "hotchpot clause as against the total funds. I think there is this "difficulty about the contrary view, namely, that if you have— "as often happens and has happened in this case—two or three "funds falling in at different times, and in each case the hotchpot "clause has to be written out, together with the other trusts, as "trusts introduced strictly by reference, you would have on each "occasion to have a separate hotchpot clause for each separate "fund as it fell in. You could not say that the original hotchpot "clause applied to the original settled fund and that there was a "second hotchpot clause applying to all the different items that "from time to time came in. If you were to go on the principle "of writing out the trusts originally inserted in the settlement "with reference to each item as and when it came in, you would "have to write them out on each separate occasion with a "separate hotchpot clause. I do not think that would be in real "accordance with the intention of persons who make a simple "settlement of the kind I have indicated. In my opinion they "are intending to treat any fund that may from time to time come "in under such a clause as being an accretion to, and augmenta- "tion of, the original trust fund."

With those observations I respectfully agree, and I think that there is really great force in the argument based on the hotchpot clause as supporting the conclusion that, under an after-acquired property clause of this kind, the intention is to effect an accretion

[4] [1913] 2 Ch. 224.

[5] Ibid. 235.

to the wife's fund or the husband's fund, as the case may be. Mr. Buckley sought to minimize the force of the argument against him on the hotchpot clause by submitting that, in any case, for the purposes of hotchpot, all sums coming in at any time or from time to time under the after-acquired property clause should be treated as one fund; so there would be, as it were, only one duplication of the hotchpot process and not a series of hotchpots as and when each piece of property fell in under the after-acquired property clause. I am not satisfied as to that, and it certainly seems to conflict with the view of Sargant J. that this question of hotchpot might arise again and again as and when after-acquired property fell in. It must be remembered that the after-acquired property may come from all kinds of different sources and at different times, and to my mind, once the view is adopted that the after-acquired property clause introduces trusts strictly by reference, it is difficult to say that, for the purposes of a hotchpot clause such as this, the whole of the after-acquired property should be treated as constituting one fund held under one set of referential trusts.

Then Mr. Buckley said, as I understood him, that although the working of the hotchpot clause, on his construction of the settlement, might be a little unfair, it was not, on the facts of this case, so very unfair because the inequality (I think he said) could not exceed a sum of £3,000, being the value of the wife's trust fund. I do not think that that consideration is a valid one for the purpose of testing the question of principle.

Mr. Buckley referred us—I think that this is the only other case I need mention—to *In re Cavendish*,[6] a decision of Parker J., in which he held that words closely resembling the words of trust in the after-acquired property clause in the present case created for the purposes of the hotchpot provision there in question a referential trust and not a coalescence of the after-acquired property with the fund which was originally settled. There was in that case only one fund in question, so that the complications pointed out by Sargant J. in *In re Fraser*[7] did not arise. There was also a special feature of the case, from which it could be inferred that there was no amalgamation. That point, shortly stated, seems to have been this: the subject-matter of the settlement was the sum of £15,000, to which the wife in that case had become entitled under the terms of another settlement. It seems that under the provisions of a certain deed poll, it was possible that

[6] [1912] 1 Ch. 794.

[7] [1913] 2 Ch. 224.

certain sums which she might receive, other than the £15,000, might be taken in reduction of the £15,000, and there was a provision in the settlement which Parker J. had to consider to the effect that, in the event of the wife becoming entitled to any sum which, if received, would reduce the £15,000, her right to it might be surrendered by the trustees so as to keep the £15,000 intact. Inasmuch as those additional sums would presumably have been caught by the after-acquired property clause, it was pointed out by Parker J. that, if there was coalescence of the funds, it would be a matter of indifference to the parties whether these additional sums were taken or not, because, if the £15,000 was reduced, the reduction would be offset by receipt of the additional sums.

It seems to me, therefore, that *In re Cavendish* [8] is distinguishable on its facts from the present case; but there is no doubt that Parker J. clearly expressed an opinion against consolidation or amalgamation of after-acquired property, which I think it is really impossible to reconcile with the view expressed by Sargant J. in *In re Fraser.*[9] In truth, I think little assistance can be derived from the authorities on this question. I refer again to what was said by Cozens-Hardy M.R. in *In re Marke Wood* [10]: "In my "opinion there is no law and no presumption applicable to a "case of this kind. It depends, in my opinion, upon the true "meaning and effect of the will as a whole." Speaking for myself, I prefer the view of Sargant J. to that of Parker J.; and, in my judgment, looking at this settlement as a whole, the effect of the after-acquired property clause, construed in conjunction with the rest of the document, was to bring about an accretion to the assets comprised in the wife's trust fund, so that, whenever any property became caught by the after-acquired property clause, thereafter the expression "the wife's trust fund" could be used with accuracy to denote not merely the original £3,000 but the accretion thereto. If that view is right, then it follows that the appointment made by Mrs. Rydon did have the effect of passing the entire fund, both original and accreted, and she was in no way inaccurate in defining the property over which she was exercising her power as "the wife's trust fund."

Mr. Buckley argued that, even if there was such an amalgamation, nevertheless it was an amalgamation to create a new fund compounded in part of the original wife's trust fund and in part of the accretion thereto. He said that it followed that even if

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[8] [1912] 1 Ch. 794.
[9] [1913] 2 Ch. 224.
[10] [1913] 2 Ch. 574, 583.

C. A.
1954

Rydon's Settlement, *In re.* Barclays Bank Ld. *v.* Everitt.

Jenkins L.J.

there had been an amalgamation, an appointment of the wife's trust fund would not pass the whole fund, but would pass only that part of it which was originally comprised in the wife's trust fund. With all respect, I find it impossible to accept that argument, which would lead to the most extraordinary and inconvenient results. I think that, once it is held that there has been a consolidation, the consolidated fund becomes the wife's trust fund for all purposes.

I should next consider the other aspect of the case, the second of the two questions stated earlier in this judgment. If I am right so far, then (as I have said) it is plain that the appointment contained in clause 3 of the will passed the whole of the property, both the original trust fund and the after-acquired property. But, supposing I am wrong, it is necessary to consider whether, although Mrs. Rydon was to some extent inaccurate in using the expression " the wife's trust fund " in any sense other than as meaning the original £3,000, it is yet possible to construe clause 3 as a whole in such a way as to reach the conclusion that she expressed an intention to appoint the whole fund.

[His Lordship, considering the construction of clause 3, said:] One thing, I think, must be abundantly plain to anyone reading the clause and knowing that the fund originally settled on behalf of the wife consisted merely of a sum of £3,000 to be invested in trustee securities, and that is that Mrs. Rydon could not possibly have meant to refer only to that sum of £3,000 when she used the expression " divers trust funds and property," and went on to say " therein and hereinafter shortly referred to as " ' the wife's trust fund.' " On the view I am now assuming, it would not be strictly accurate to designate as " the wife's trust " fund " anything except the original £3,000 and the investments representing it, but there one is faced with a choice between two inaccuracies: either the testatrix has wholly misdescribed the fund by calling it " divers trust funds and property," when it is really nothing of the sort, or else she is using " the wife's trust " fund " otherwise than in the primary and narrow meaning assigned to it by the settlement. The problem of construction must be resolved by choosing between those two inaccuracies.

[Later, his Lordship said:] To my mind the use of the words " therein and hereinafter shortly referred to as ' the wife's trust " ' fund,' " even though one must concede they are not wholly accurate, does not provide any sufficiently clear ground for cutting down the meaning of " divers trust funds and property " so as to make it answer the description of the trust fund originally brought in on behalf of the wife. Accordingly, on the question as to the construction of clause 3 of the will, read in conjunction with the settlement, I come to the conclusion that the effect of clause 3, upon its true construction, was to pass the whole of the fund, both the original fund and the fund representing the after-acquired property.

Roxburgh J., who heard a very full argument of the case, very much on the lines of the interesting argument which has been presented to us, would (as I understand his judgment) have come to the same conclusion as I have on the question whether the trusts declared by the after-acquired property clause were referential trusts or such as to bring about an accretion to and coalescence with the original wife's trust fund. He, as I understand him, would have concluded that there was an accretion or coalescence, and he expressed himself thus on this point: " I " would like to say one word about the case of *In re Cavendish.*[11] " Parker J. having stated clearly that the question was one of " construction of the document as a whole, I am not quite clear " why he found it possible in that case to stop before the end of " the document and reach something in the nature of a prima facie " conclusion. But whether he was entitled to do so, or whether " he was not—I do not know: that is not a case which I have " to decide—for my own part, I should not have felt any difficulty " at all about enlarging the definition of the wife's fund by " reference to the later provisions of the settlement, but for the " existence of this exception from the trusts. If the words had " been ' To be held upon the trusts and subject to the powers " ' and provisions hereinbefore declared concerning the money " ' forming part of the wife's trust fund or as near thereto as the " ' circumstances will permit,' I should have had no hesitation in " holding that there was an amalgamation, and I should crave in " aid *In re Fraser,*[12] which, if those had been the words, really " seems to me to be indistinguishable, and I should prefer the " approach in *In re Fraser*[12] to the approach in *In re Cavendish.*[13] " With those observations of the judge I respectfully agree, but he went on thus: " But this case is differentiated from " any case to which I have been referred by these words: ' except " ' the special provisions hereinbefore contained as to half-yearly " ' sales and the application of the proceeds thereof.' In my " judgment, this case turns upon what is the true meaning and " effect of that exception. In my view, it is not, as Sir Andrew

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[11] [1912] 1 Ch. 794.

[12] [1913] 2 Ch. 224.

[13] [1912] 1 Ch. 794.

C. A.
1954

Rydon's Settlement, *In re.* Barclays Bank Ld. *v.* Everitt.

Jenkins L.J.

"Clark argued, an exception of the provisions relating to a part "of the trust, but it is an exception of the provisions relating to "the trusts as a whole. Therefore, I have no direct guidance "from any of the cases, except the dictum in *In re Marke* "*Wood* [14] to which I have already referred."

For the reasons which I have endeavoured to state, I cannot accept the judge's conclusion that the exception of the special provisions as to half-yearly sales had the effect of preventing the trusts of the after-acquired property from effecting a coalescence of the after-acquired property with the original wife's trust fund. On the question of the construction of the appointment, the judge seems to have taken the view that it must be regarded as appointing only that which could be described as "the wife's trust fund" upon the most strict and narrow application of the definition contained in the settlement. I venture to differ from him on that point also, and would, for my part, take a rather more liberal view of the construction of the appointment, which view has led me to the conclusion which I have already indicated.

For these reasons, I would allow this appeal and make a declaration to the effect that the appointment did extend to the fund representing the after-acquired property as well as to the fund representing the £3,000 originally settled on behalf of Mrs. Rydon.

Evershed M.R. I have come to the same conclusion; but, because we are differing from the view of Roxburgh J. I should like to state briefly the grounds for my decision. The question, in the end of all, is a question of the construction of clause 3 of Mrs. Rydon's will. [His Lordship, considering it, said:] The phrase "divers trust funds and property" seems to me to indicate a reference to the whole subject-matter over which she had the power. Still, it is undoubtedly true that she has proceeded to identify that subject-matter by the words "therein" (that is, in the settlement) "referred to as 'the wife's trust "'fund'"; and so inevitably one is thrown back to the terms of the settlement and required to discover, by reference to the settlement, what identification the appointor had in mind.

For reasons which Jenkins L.J. has stated, and which I do not repeat, I am also of opinion that, for the purposes of the settlement, the subject-matter of the after-acquired property covenant should be treated as, and was intended to be, an accretion to the funds which were initially defined as "the wife's "trust fund." I think, putting the matter quite briefly, that reference to the hotchpot clause provides a powerful incentive to that conclusion, and if in the hotchpot clause "the wife's "trust fund" should be treated as including any accretion by way of after-acquired property, then I think that the same must inevitably follow as regards the powers of appointment over corpus which immediately precede in the settlement the hotchpot clause.

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[14] [1913] 2 Ch. 574.

Roxburgh J. indeed, would (as I understand it) have himself come to that conclusion on the meaning of the settlement had it not been for one circumstance. After stating that his mind had greatly vacillated in this case (and it is obviously a most difficult case), he said at the end of his judgment: "I should "not have felt any difficulty at all about enlarging the definition "of the wife's fund by reference to the later provisions of "the settlement but for the existence of this exception from the "trusts." The reference at the end of that citation is to the language in the after-acquired property clause. But, in my judgment, the suggested effect of that clause as negativing accretion is itself displaced, when regard is had to the circumstance that, earlier on and in relation to that part of the settlement which provides for the replacement of the expended capital of the £3,000 fund, the settlement uses the same exception in stating that the replaced funds should be held upon the trusts of the wife's trust fund. It is conceded that the replaced funds are, and ought for all purposes to be, treated as part of "the "wife's trust fund"; so that the presence in that earlier part of the settlement of the same exception cannot be regarded as fatal to, or an obstacle to, "the wife's trust fund" having a meaning more extended than merely by reference to the original sum of £3,000. In any case, as my brother has also stated, and having regard to the great difficulties of construction in the settlement, it seems to me legitimate to construe the language of Mrs. Rydon in her will as giving to "the wife's trust fund" (albeit perhaps somewhat inaccurately) a meaning more extensive than by confining it narrowly to the original sum of £3,000 and whatever should thereafter represent it.

[His Lordship considered the question of construction and continued:] I need not further say anything about the cases, save this: that, in my judgment, they can do no more than provide illustrations of what, after all, is the task, in all these cases, of

C. A.
1954

RYDON'S SETTLEMENT, *In re.* BARCLAYS BANK LD. *v.* EVERITT.

Evershed M.R.

the court, namely, to construe as a whole the particular document which is put before it; and that I agree with Jenkins L.J. in thinking that the language used by Cozens-Hardy M.R. in *In re Marke Wood* [15] ought not to be regarded as laying down (and was not intended to lay down) any strict rule of construction which should compel the court to answer the present question otherwise than as I think it ought to be answered.

For these reasons, in addition to those which have been stated by my brother, I think that the answer to be given to the question posed is that which he has suggested, namely, an answer in favour of the appeal.

HODSON L.J. I agree and have nothing to add.

Appeal allowed.

Solicitors: *Kennedy, Genese & Syson; Johnson Weatherall & Sturt; Church, Adams, Tatham & Co.*

B. A. B.

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[15] [1913] 2 Ch. 574.

C. A.
1954
June 29, 30;
July 1, 2, 26.

Singleton, Jenkins and Hodson L.JJ.

INLAND REVENUE COMMISSIONERS *v.* BROADWAY COTTAGES TRUST. SAME *v.* SUNNYLANDS TRUST.

Revenue — Income tax — Settlement — Imperative trust to distribute income among specified class—Specified class unascertainable at any given time—Validity of trust—Charities members of class—Payment of income to charities—Claim for exemption from income tax —Income not income of charities—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 37 (1) (*b*).

Trust—Uncertainty—Unascertainable class. Settlement.

By a settlement dated July 14, 1950, the settlor settled a sum of £80,000 upon trust to apply the income of the trust fund during a period within the perpetuity rule for the benefit of all or any of a class of beneficiaries specified in the schedule to the deed, in such shares, proportions and manner as the trustees, of whom the settlor was one, in their absolute discretion thought fit. The specified class was admittedly unascertainable at any given time, but it was possible to determine with certainty whether any particular individual was or was not a member of this class. The settlement contained no gift over of income in default of appointment. Two

C. A.
1954

INLAND REVENUE COMMISSIONERS
v.
BROADWAY COTTAGES TRUST.
SAME
v.
SUNNYLANDS TRUST.

charitable bodies, members of the specified class, claimed exemption from income tax in respect of sums of money which they had received from the trustees of the settlement under the provisions relating to the trust of the income of the trust fund:—

Held, that the trusts of income were not such as the court could enforce. A trust for such members of a given class of objects as the trustees should select was void for uncertainty, unless the whole range of objects eligible for selection was ~~ascertained~~ or capable of ascertainment. The trusts of income were accordingly void for uncertainty and the sums paid to the two charities were not the income of the charities in respect of which they could claim exemption from income tax. The trustees held the income by way of resulting trust for the settlor, with no power to dispose of it in any manner otherwise than by paying it to, or as directed by, the settlor. Since he was one of the trustees, he must be taken to have authorized any payments theretofore made by the trustees in purported execution of the invalid trust.

Observations of Tomlin J. in *In re H. J. Ogden* [1933] Ch. 678; 49 T.L.R. 341 approved.

In re Gestetner Settlement [1953] Ch. 672; [1953] 1 All E.R. 1150 considered.

Salusbury v. *Denton* (1857) 3 K. & J. 529; *Wilson* v. *Duguid* (1883) 24 Ch.D. 244 and *In re Scarisbrick* [1951] Ch. 622; [1951] 1 T.L.R. 989; [1951] 1 All E.R. 822 distinguished.

Decision of Wynn-Parry J. [1954] 1 W.L.R. 659; [1954] 1 All E.R. 878 affirmed.

APPEALS from Wynn-Parry J. reversing two decisions of the Commissioners for the Special Purposes of the Income Tax Acts, the two appeals being heard together.

The stated cases set out the following facts: On October 22, 1952, the Broadway Cottages Trust and the Sunnylands Trust, both of which were trusts established for charitable purposes only, appealed against decisions of the Commissioners of Inland Revenue disallowing claims made for exemption from income tax in respect of the years 1950–51, 1951–52, in the case of the Broadway Cottages Trust, and the year 1950–51 in the case of the Sunnylands Trust, in relation to certain sums of money alleged to be the income of the charities and received by them from the trustees of a settlement dated July 14, 1950 (hereinafter called "the trustees"). The settlement was made between Alan Geoffrey Timpson (hereinafter called "the settlor") of the one part and trustees (of whom the settlor was one) of the other part. The subject of the settlement was £80,000, which was to be held by the trustees on trust for the wife of the settlor, Ethel Beatrice Timpson, and the other persons specified in the schedule. The settlement provided, inter alia: "(1) In this settlement the

C. A.

1954

Inland Revenue Commissioners v. Broadway Cottages Trust. Same v. Sunnylands Trust.

"following expressions shall where the context so admits have "the following respective meanings and shall be construed in the "following manner, viz.:— . . . (*c*) 'The appointed period' "means a period beginning on the date hereof and continuing "until terminated under the power hereinafter contained or if "not so terminated until twenty years after the death of the "last survivor now living of the issue of his late Majesty King "George V. (*d*) 'The beneficiaries' mean the persons specified "in the schedule hereto and 'beneficiary' means one of the "beneficiaries."

"(4) The trustees shall hold all such investments as aforesaid and the varied investments and property and interests in "property . . . from time to time subject to the trusts hereof "(all of which are hereinafter included in the expression 'the "'trust fund') upon trust for such of the beneficiaries as shall "be living or (being a charitable trust) existing at the termination "of the appointed period and if more than one in equal shares.

"(5) The interest to be taken under the last preceding clause "hereof by any beneficiary at the termination of the appointed "period shall be absolute interest.

"(6) Provided always that the trustees at any time or times "not being less than six years after the said day of declaration ". . . if in their discretion they think fit so to do may by deed "declare the appointed period to be terminated either as to the "whole of the trust fund or as to any aliquot or specific part "thereof to the intent that the trust fund or (as the case may "be) the part thereof to which such declaration relates and the "income of the same may be held upon the trusts and subject to "the powers and provisions upon and subject to which the same "would at the date of such declaration be held if the appointed "period had then been terminated by effluxion of time and such "declaration shall be effectual.

"(7) And if all the beneficial trusts hereinbefore declared "shall fail . . . then the trust fund and the income thereof shall "be held upon charitable trusts to be declared by the trustees ". . . to the intent that neither the donor or any wife or widow "of his shall in any event whatsoever take any interest by way "of resulting trust or otherwise in the trust fund or the income "thereof or any accretions thereto or in any part of the same.

"(8) During the appointed period the trustees shall hold the "income of the trust fund from the date or respective dates from "which the trustees shall become entitled to such income upon "trust to apply the same for the benefit of all or any one or more "of the donor's said wife and the beneficiaries in such shares proportions and manner as the trustees in their discretion from time to time think fit (and so that such moneys as the trustees may from time to time think fit to apply for the benefit of any of the beneficiaries who shall have attained the age of twenty-one years be paid to him or to her on his or her receipt which shall be a complete discharge to the trustees).

"(9) Provided always that the trustees shall have the power from time to time at their discretion to capitalize the said income or any part thereof either by investing the same and treating such investments as part of the capital of the trust fund or in any other mode of capitalization which may appear to the trustees to be expedient and pending such application as aforesaid of such income the trustees may temporarily invest or place on deposit the same and all income thereby produced shall be treated as the income of the trust fund.

"(10) The trustees shall also have power during the appointed period to apply the whole or any part of the capital of the trust fund in their discretion for the benefit of all or any one or more of the beneficiaries either by way of advancement on account of his or her or their share or shares or not as the trustees may in their discretion think fit and notwithstanding in the case of any beneficiary that the total amount so applied for the benefit of such beneficiary may exceed the share to which he or she is contingently entitled to any share in the capital of the trust fund."

"(15) Every discretion hereby conferred on the trustees shall be an absolute and uncontrolled discretion and may (if and so far as circumstances permit) be exercised from time to time."

"THE SCHEDULE

"1. All persons (other than the settlor and any wife of his and any infant child of his) who have been in the past or (as the case may be) at the date of these presents or subsequently thereto at any time during the period ending on December 31, 1980, or during the appointed period whichever shall be the shorter employed by:—(*a*) the settlor; (*b*) the wife of the settlor; (*c*) William Timpson deceased (father of the settlor and who died on January 20, 1929); (*d*) Katherine Chapman Timpson deceased (mother of the settlor and who died on December 16, 1940); (*e*) William Timpson Limited or by any other limited company which may succeed to the business of William Timpson Limited; (*f*) any other limited company of which the settlor is a director at the date of these presents.

C. A.

1954

INLAND REVENUE COMMISSIONERS v. BROADWAY COTTAGES TRUST. SAME v. SUNNYLANDS TRUST.

"2. The wives and widows of any such persons as is specified "in cl. 1 of this schedule.

"3. All persons (other than the settlor and any wife of his "and any infant child of his) who are the issue however remote "of the said William Timpson deceased . . . and Charles Henry "Rutherford deceased (father of the wife of the settlor and who "died on February 17, 1930)."

4, 5, 6, 7. [Certain named persons.]

"8. Alastair John Grenville Stevenson and any spouse of his "or issue of him."

9. [The trustees of the settlement and their spouses or issue.]

"10. Joseph Baker and any spouse of his or issue of him.

"11. Godchildren of the settlor or his wife. . . .

"12. Broadway Cottages Trust and Sunnylands Trust (both "being charitable foundations)."

It was contended on behalf of the Crown: (*a*) That in order to construe this deed the whole deed must be looked at, both the clauses relating to the capital of the settled fund and those dealing with the income; (*b*) that a complete and exhaustive list of all the beneficiaries entitled to participate in a distribution of the capital could not be provided; (*c*) that the deed was void for uncertainty; (*d*) that, accordingly, the sums of money received by the charities from the trustees were not the income of the charities and they were not entitled to exemption from income tax under section 37 (1) (*b*) of the Income Tax Act, 1918.

It was contended on behalf of the charities: (*a*) That the validity of the trusts affecting the income of the settled fund was not affected by the validity or otherwise of the trusts relating to the capital of the settled fund; (*b*) that the trustees had been given a power of selection by cl. 8 of the settlement in regard to the income of the settled fund among the beneficiaries, and the proper test of the validity of such a power was whether the qualifications of the class were such that it could be determined whether any given person did or did not possess the qualification; (*c*) that the qualifications required under the terms of this settlement were neither mental nor moral, but were in the nature of facts which could be determined by the court; (*d*) that the power to appoint the income was valid; (*e*) that the money received by the charities from the trustees was income of the charities in respect of which the charities were entitled to repayment of income tax under the exemption granted to any body of persons established for charitable purposes only by section 37 (1) (*b*) of the Income Tax Act, 1918.

The Special Commissioners allowed the appeal of the charities and held that the trusts of the settlement, in so far as they related to the income of the trust fund, were not void for uncertainty, and that the trustees under the provisions of cl. 8 of the settlement had a power of selection and that it was a valid and effective trust of the income of the trust fund, and that, accordingly, the sums of money received by the charities from the trustees were their income and entitled to the exemption claimed.

Wynn-Parry J. allowed the appeals of the Crown from the decisions of the Special Commissioners. He held that the trusts of income were void for uncertainty, so that the sums of money received by the charities from the trustees were not the income of the charities, which were accordingly not entitled to exemption from tax under section 37 (1) (*b*) of the Income Tax Act, 1918.

The charities appealed.

John Pennycuick Q.C. and *P. J. Brennan* for the appellants, the two charities. The trustees of this settlement, as the donees of the power of appointment over income, are under a duty to exercise the power. The power, being coupled with a duty, will not be defeated by a failure of the trustees to exercise it. In that event the court will exercise the power as best it can, or it will imply a trust in default of appointment for the objects of the power. If they are unascertainable, the court will imply a trust in default in favour of the settlor. The decisions on powers of appointment in favour of relations are examples of cases where the appointees were unascertainable. In such a case the court will imply a trust in favour of the statutory next-of-kin: *Salusbury* v. *Denton.*[1] The court will devise some machinery for giving effect to a settlor's intentions. For a trust to be enforceable it must be such as the court can control: *Morice* v. *Bishop of Durham.*[2] There is no trust over which the court cannot assume control. If a trust were not subject to control, the trustees would be absolute owners. This trust can be controlled by the court. There is no difficulty here in deciding whether any particular person is an object of the trust. If the trustees appointed in favour of a non-object, the court could intervene to restrain the appointment. The present trustees are prepared to execute the trusts. Should they fail to do so, the court would devise a

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[1] (1857) 3 K. & J. 529.

[2] (1805) 10 Ves. 522.

INLAND REVENUE COMMISSIONERS v. BROADWAY COTTAGES TRUST. SAME v. SUNNYLANDS TRUST.

scheme of administration. It might do so by a cy-près scheme for the division of the income between the various classes of beneficiaries. [Reference was made to *Brown* v. *Higgs* [3]; Farwell on Powers, 3rd ed., p. 528; *Grant* v. *Lynam* [4]; *Wilson* v. *Duguid* [5]; and *In re Scarisbrick.*[6]]

The basis of the Crown's case is *In re H. J. Ogden.*[7] There the court had evidence that all the objects of the power were ascertainable. There was certainty in the field of selection. Tomlin J. did not address his mind to the position which would arise if there had not been such certainty. That is not an authority which governs this case. There is in fact no distinction between this case and *In re Gestetner Settlement.*[8]

Geoffrey Cross Q.C., *J. H. Stamp* and *Sir Reginald Hills* for the Crown. The basis of the Crown's case is that this cannot be a valid trust unless the court can execute it should the trustees default in doing so. This is clear from the judgment of Lord Eldon in *Morice* v. *Bishop of Durham.*[9] Here the only trust is in favour of an unascertainable class, with no trust in default of appointment. In *In re Gestetner Settlement,*[10] although the class of beneficiaries were unascertainable, the court could execute the trust in default of appointment. The relation cases are not relevant, since the court there was able to hold that in default of appointment in favour of an unascertainable class, there was a trust in favour of an ascertainable class. The court must consider what would happen in the event of the trustees failing to exercise the power. In that case there would be a resulting trust for the settlor. The income is accordingly his and the payment to the appellant charities flows from him, and they cannot say that income paid to them is paid under valid trusts. The settlor is one of the trustees and can control the income. Really all that the settlor has given to the trustees is a revocable mandate to dispose of the income of the trust fund. *In re Park* [11] was the case of a bare power; and in *In re Jones* [12] there was a trust in default of appointment. Those decisions are of no assistance in this case. The observations of Tomlin J. in *In re H. J. Ogden* [13] support the Crown's contention that a trust in favour of an unascertainable class is void for uncertainty.

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[3] (1803) 8 Ves. 561.

[4] (1828) 4 Russ. 292.

[5] (1883) 24 Ch.D. 244.

[6] [1951] Ch. 622; [1951] 1 T.L.R. 989; [1951] 1 All E.R. 822.

[7] [1933] Ch. 678; 49 T.L.R. 341.

[8] [1953] Ch. 672; [1953] 1 All E.R. 1150.

[9] 10 Ves. 522, 539, 540.

[10] [1953] Ch. 672.

[11] [1932] 1 Ch. 580.

[12] [1945] Ch. 105; 61 T.L.R. 120.

[13] [1933] Ch. 678, 682.

J. H. Stamp following. It is a question of degree whether trusts are sufficiently defined to be enforceable. There may come a point where a class of beneficiaries is so wide as to be unascertainable, and then no duty can be imposed on the trustees, since they cannot owe a duty to somebody who cannot be ascertained. If trustees refuse to perform trusts the court must do so; what cannot be performed by the court cannot be performed as a duty by trustees. No member of this class of beneficiaries could ask the court to enforce the trusts. There is no trust here because there is no class of beneficiaries entitled to the property. The trustees have extensive rights of patronage. The settlor is one of the trustees. He has not parted with the property. This is not a genuine trust.

Pennycuick Q.C. in reply. In this case the settlor cannot get anything for himself. Here the application of the income can be controlled by the court. The court would control any application of income not in accordance with the terms of the trust. The trustees are under a duty to apply all the income in accordance with the terms of the trust. If the trustees failed to perform that duty, the court could appoint other trustees who would be willing to act. The court would see that the trusts were administered by trustees willing to do so. In fact there is no difficulty here. The trustees have always been willing to act. Any gap in the trusts is filled up by a resulting trust in favour of the settlor. The income paid to the appellant charities was paid under a power paramount to the interest of the settlor and the income so paid became their income.

Cur. adv. vult.

July 26. Jenkins L.J. read the judgment of the court. The charitable character of the two appellant institutions and their consequent right to exemption from tax on their income under the provisions of section 37 (1) (*b*) are not in dispute. The sole question in each of the two appeals is whether the sums of money received by the appellant institution from the trustees, and admittedly paid by the trustees out of the income of the fund comprised in the settlement, were income of such institution. The answer to that question depends wholly on the further question whether the relevant provisions of the settlement had the effect contended for by the appellant institutions of creating a valid trust of income in favour of those institutions amongst other objects, in which case the appeals must succeed, or, as

C. A.
1954

Inland Revenue Commissioners v. Broadway Cottages Trust. Same v. Sunnylands Trust.

contended by the Commissioners of Inland Revenue and held by Wynn-Parry J., created no such valid trust, in which case the appeals must fail. [His Lordship read the relevant provisions of the settlement and continued:] It will be seen that the operative provisions of the settlement as regards capital comprise (in clause 4) a trust for such of the beneficiaries as shall be living or (being a charitable trust) existing at the termination of the appointed period and if more than one in equal shares; (in clause 6) a power to the trustees to declare the appointed period to be terminated, as regards the whole or any part of the trust fund, so as to bring into immediate operation the trust declared by clause 4, as if the appointed period had terminated by effluxion of time; and (in clause 10) a power to the trustees during the trust period to apply capital for the benefit of the beneficiaries or any of them. It is further to be observed that clause 7, which precedes the trust of income declared by clause 8, contains a gift over upon charitable trusts "if all the beneficial trusts herein-"before declared shall fail." It is common ground that this clause, preceding as it does the trust of income during the appointed period, has no application to the failure of that trust.

It should next be noted that the only disposition of income during the settlement period (apart from the power of capitalizing income contained in clause 9) consists of the trust declared by clause 8, under which the trustees are to apply the same for the benefit of all or any one or more of the settlor's wife and the beneficiaries in such shares, proportions and manner as the trustees in their discretion from time to time think fit.

Lastly, it is to be remarked that the class of beneficiaries described in the schedule includes (in paragraph 1) persons employed in the past or at the date of the settlement or at any time thereafter during the period until December 31, 1980, or the end of the appointed period, whichever is the shorter, not only by the settlor and his wife but by his father who died in 1929, his mother who died in 1940, the company, William Timpson Ld., which according to the stated case is a public company formed in 1929 to take over the business of a private company of the same name formed in 1912 to take over the business founded in 1870 by the settlor's father, any other limited company which may succeed to the business of William Timpson Ld., or any other limited company of which the settlor was a director at the date of the settlement; and in paragraph 2 the wives and widows of any such persons as are specified in paragraph 1.

In view of the wide scope of paragraphs 1 and 2 of the schedule it is conceded on the part of the appellants that the persons who, according to the terms of the schedule, constitute "the beneficiaries" for the purposes of the settlement, comprise an aggregate of objects which is incapable of ascertainment, in the sense that it would be impossible at any given time to achieve a complete and exhaustive enumeration of all the persons then qualified for inclusion in the class of "beneficiaries" under the terms of the schedule. On the other hand, it is conceded on the part of the Crown that the qualifications for inclusion in the class of "beneficiaries" prescribed by the schedule are sufficiently precise to make it possible to determine with certainty whether any particular individual is or is not a member of the class.

It must, we think, follow from the appellants' concession to the effect that the class of "beneficiaries" is incapable of ascertainment, and we understand them not to dispute, that the trust of the capital of the settled fund for all the beneficiaries living or existing at the termination of the appointed period, and if more than one in equal shares, must be void for uncertainty, inasmuch as there can be no division in equal shares amongst a class of persons unless all the members of the class are known.

We think it must also follow that a trust to divide the income of the trust fund during the appointed period amongst a class consisting of the settlor's wife and all the beneficiaries for the time being living or in existence, and if more than one in equal shares, would equally have been void for uncertainty.

The trust of income during the appointed period as actually declared by clause 8 is not in those terms, but is a trust to apply such income for the benefit of all or such one or more of the settlor's wife and the beneficiaries as the trustees in their discretion think fit, and the question in the case is, in effect, whether the power of selection thus conferred on the trustees saves the trust from uncertainty having regard to the concession made by the Crown to the effect that, while the trustees can never discover all the beneficiaries, they can always tell whether a given individual is or is not one of the beneficiaries, and can therefore, with certainty, confine any payments they think fit to make to persons qualified as beneficiaries according to the terms of the schedule.

In approaching this question both sides accept the principle stated by Lord Eldon in *Morice* v. *Bishop of Durham*,[1] where he said: "As it is a maxim, that the execution of a trust shall

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[1] (1805) 10 Ves. 522, 539, 540.

C. A.
1954

INLAND REVENUE COMMISSIONERS v. BROADWAY COTTAGES TRUST.
SAME v. SUNNYLAND'S TRUST.

"be under the control of the court, it must be of such a nature, "that it can be under that control; so that the administration "of it can be reviewed by the court; or, if the trustee dies, the "court itself can execute the trust: a trust therefore, which, "in case of maladministration could be reformed; and a due "administration directed; and then, unless the subject and the "objects can be ascertained, upon principles, familiar in other "cases, it must be decided, that the court can neither reform "maladministration, nor direct a due administration." The principle can be concisely stated by saying that, in order to be valid, a trust must be one which the court can control and execute. Mr. Pennycuick, for the appellants, contends that it is satisfied by the trust now before the court. Mr. Cross, for the Crown, contends that it is not.

The arguments in support of the Crown's claim that the trust is invalid are to this effect: First, the court could not compel the trustees to make any distribution of income under clause 8 of the settlement, for that clause purports to confer on the trustees an uncontrolled discretion to determine the person or persons falling within the class of beneficiaries to whom any distribution is to be made, and the shares in which those persons, if more than one, are to take; and it would be beyond the power of the court to make or enforce an order upon the trustees to exercise that discretion. Nor could the court itself exercise the trustees' discretion in the event of their failing or refusing to do so, for the discretion is conferred on, and exercisable by, the trustees alone. Secondly, if the class of beneficiaries was an ascertainable class, it would or might be possible to imply a trust in default of distribution by the trustees for all the members of the class in equal shares, and that would be a trust which the court could control and execute. But, as the class is unascertainable, no such trust can be implied. Thirdly, again, if the class was ascertainable, it would or might be possible for all the beneficiaries to join in a demand for the execution of the trust by the distribution of the whole income amongst themselves in equal shares, and proper for the court to recognize and enforce that demand as made by all the persons beneficially interested in the subject-matter of the trust. But, as the class is unascertainable, no such demand is possible. Short of the whole class, no beneficiary or collection of beneficiaries can claim execution of the trust, for the trustees are under no duty to any particular beneficiary or beneficiaries, short of the whole class, to make any distribution to him or them

C. A.
1954

INLAND REVENUE COMMISSIONERS
v.
BROADWAY COTTAGES TRUST.
SAME
v.
SUNNYLANDS TRUST.

of the whole or any part of the income; and such duty as the trust purports to impose on them towards the class as a whole is illusory, since the whole class can never be ascertained.

Fourthly, the validity of the trust must be tested by considering its terms and asking oneself whether the court would be able to control and execute the trust if called upon to do so. That question must be answered by reference to what might happen, and not merely by reference to what would be likely to happen. That is to say, the charge of invalidity cannot be met by making the assumption (in itself reasonable enough) that trustees undertaking a trust such as this would, in all probability, carry it out, by distributing the income amongst persons falling within the class of beneficiaries as defined by the settlement. On the contrary, it must be assumed that the trustees for some reason or other might fail or refuse to make any distribution, and see whether the court could execute the trust in that event. Consideration of the case on that assumption shows that the most the court could do would be to remove the inert or recalcitrant trustees and appoint others in their place. That, however, would not be execution of the trust by the court, but a mere substitution for one set of trustees invested with an uncontrollable discretion of another set of trustees similarly invested, who might be equally inert or recalcitrant.

5 Fifthly, there is a distinction between a trust for distribution amongst all or any one or more exclusively of the others or other of an unascertainable class, with no other disposition (which is this case), and a power to distribute amongst all or any one or more exclusively of the others or other of an unascertainable class, with a trust in default of appointment for an ascertainable class. In the latter case (at all events if the qualification for membership of the unascertainable class is such as to make it possible to decide with certainty whether a given individual is or is not a member of it) there is a valid disposition of the beneficial interest which the court can control and execute in the shape of the trust in default of appointment and, although the execution of the power is beyond the control of the court, except in the negative sense that it can prevent any purported exercise of the power in favour of non-objects, it will nevertheless be a valid power operating, if and so far as exercised, as a defeasance in favour of the appointee or appointees of the interests given in default of appointment.

This is illustrated by the decision of Harman J. in *In re*

C. A.
1954

Inland Revenue Commissioners
v.
Broadway Cottages Trust.
Same
v.
Sunnylands Trust.

Gestetner Settlement [2] (where the class of objects of the power was comparable to the class of objects of the trust in the present case), that of Clauson J. in *In re Park* [3] (where there was a power to appoint to anyone other than the donee of the power herself), and that of Vaisey J. in *In re Jones* [4] (where there was a provision construed by Vaisey J. as a power to appoint to any natural person (as distinct from a corporation) living at the death of the donee of the power). In the former case (of which the trust now before the court is an example) no trust which the court can control and execute, or, in other words, no valid trust at all, is created, for there can be no trust in favour of the unascertainable class as a whole; no beneficial interest is conferred on any particular member or members of the class unless and until the trustees think fit to make some distribution to him or them, and the making or withholding of any such distribution rests on the uncontrolled discretion of the trustees, which the court can neither exercise nor compel to be exercised.

In *In re H. J. Ogden* [5] Tomlin J. rightly took the view that it was essential to the validity of a trust for such of a given class of objects as the trustee should select that the trustee should know, or be able to ascertain, all the objects from which he was enjoined to select by the terms of the trust. The trust in that case was contained in a gift by will of a share in the testator's residuary estate to Sir Herbert Samuel "to be by him distributed" (we quote the summary of the terms of the bequest given in the headnote) "amongst such political federations or bodies in the "United Kingdom having as their objects or one of their objects "the promotion of Liberal principles in politics as he shall in his "absolute discretion select and in such shares and proportions "as he shall in the like discretion think fit." Tomlin J. said [6]: "All that I have to consider is, whether there is such uncer-"tainty in the field of selection that it is impossible for the "selector to determine from which institutions he is to select. "If so, the bequest is bad on the ground of uncertainty. The "question is one of degree in each case, whether, having regard "to the language of the will, and the circumstances of the case, "there is such uncertainty as to justify the court in coming to "the conclusion that the gift is bad. Now, it is to be observed "that in the present case the field of selection is: 'political

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[2] [1953] Ch. 672; [1953] 1 All E.R. 1150.

[3] [1932] 1 Ch. 580.

[4] [1945] Ch. 105; 61 T.L.R. 120.

[5] [1933] Ch. 678; 49 T.L.R. 341.

[6] [1933] Ch. 678, 682.

“ ‘federations or associations or bodies in the United Kingdom, having as their objects or one of their objects the promotion of Liberal principles.’ I have the evidence of Sir Herbert Samuel, who has referred to a number of bodies which come within the description, and who states that, in fact, he can ascertain by inquiry all the bodies that can come within that description, and I take the view that upon that evidence, and the language of the will, and having regard to the principles laid down from time to time, there is certainty here in the field of selection. It comes within the words of Lord Atkinson in *Houston* v. *Burns*,[7] ‘I do not think that this case has the slightest resemblance to those in which property is vested in trustees to be applied for the support or benefit of such institutions of a particular class as may be in existence, or in the course of creation, in any given town or area at the time at which the will speaks. There is no vagueness or uncertainty in such cases at all.’ Now, it seems to me that here you have a class capable of ascertainment, and in a specified area, and in my view the bequest is not void on the ground that the field is too vague. I hold that the gift is not void for uncertainty.”

Sixthly, the court cannot mend the invalidity of the trust by imposing an arbitrary distribution amongst some only of the whole unascertainable class. The line of cases referred to in argument as the “relations” cases (see *Grant* v. *Lynam*,[8] *Harding* v. *Glyn*,[9] cited in *Grant* v. *Lynam*,[10] *Salusbury* v. *Denton*,[11] *Wilson* v. *Duguid*,[12] *In re Scarisbrick* [13]), relied on by the appellants, may be regarded as further illustration of the proposition, accepted above, that a power to appoint amongst an unascertainable class may be valid, but those cases are sui generis, in so far as they decide that a trust for such of the relations of a given person as the trustee may select, while enabling the trustee to select relations in any degree, operates, in default of selection, as a trust for the statutory next-of-kin of the propositus, a trust for relations in every degree however remote being admittedly void for uncertainty. No comparable contraction of the class in default of selection by the trustees is possible in the present case.

Seventhly, for these reasons, the trust declared by clause 8 of the settlement is invalid and the most that the settlor has done by that clause is to confer on the trustees a revocable mandate to distribute the income amongst such persons or institutions selected by the trustees as fall within the class of beneficiaries as defined by the settlement, including the two appellant institutions. But payments made to either of those institutions under such revocable mandate cannot be income of that institution, so as to enable it to recover the tax paid thereon, any more than an uncovenanted subscription to its funds voluntarily made by the settlor himself would be part of its income for the purposes of such recovery.

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[7] [1918] A.C. 337, 345; 34 T.L.R. 219.

[8] (1828) 4 Russ. 292, 293, 294.

[9] (1739) 1 Atk. 469.

[10] 4 Russ. 292.

[11] (1857) 3 K. & J. 529.

[12] (1883) 24 Ch.D. 244, 251.

[13] [1951] Ch. 622; [1951] 1 T.L.R. 989; [1951] 1 All E.R. 822.

On the appellants' side it is argued that there is no reason whatever to suppose that any difficulty would arise in practice in the implementation of the trust declared by clause 8 of the settlement. The trustees, having undertaken the trust, must be assumed to be ready and willing to carry it out and, as it is possible to decide with certainty whether any particular person is or is not qualified as a member of the class of "beneficiaries," they can carry it out by distributing the income amongst undoubted members of the class, selected by them. So far as misfeasance by the trustees is concerned, that is to say, distribution otherwise than amongst members of the class, this could be restrained by the court at the suit of any member of the class. So far as non-feasance on the part of the trustees is concerned, the court could, at the suit of any such member, remove the offending trustees and appoint others in their place, and repeat the process as necessary until trustees, who would duly carry out the terms of the trust, were found. The possibility that not only the original trustees but every set of trustees appointed in their place would fail or refuse to do this is so remote that it can for practical purposes be disregarded. If necessary the court, acting on the analogy of the "relations" cases, could declare a trust in default of distribution by the trustees in favour of a modified class which could be completely ascertained. Alternatively, the court might, on the analogy of *Salusbury* v. *Denton*,[14] hold the income divisible in specified proportions by reference to the classification of objects contained in the schedule, as, for example, by appropriating one share to the beneficiary or collection of beneficiaries described in each of the paragraphs of the schedule. Even if clause 8 creates no valid trust, the settlor has by that clause at least conferred on the trustees an irrevocable power

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[14] 3 K. & J. 529.

C. A.
1954

INLAND REVENUE COMMISSIONERS
v.
BROADWAY COTTAGES TRUST.
SAME
v.
SUNNYLANDS TRUST.

to distribute the income amongst such members of the class of beneficiaries (including the two appellant institutions) as they think fit, with a resulting trust in favour of the settlor, if and so far as the power is not exercised; and payments made to either of the appellant institutions in exercise of this irrevocable power are income of that institution for all purposes. *In re H. J. Ogden*[15] is not, in the appellants' submission, an authority against them. In that case the whole range of possible objects was on the evidence completely ascertained, and there was no need for the judge to decide what the position would have been if the whole range of objects had not been completely ascertained, and his observations on that matter were accordingly obiter. Further, it is not clear whether the judge was referring to uncertainty as regards the complete enumeration of all possible objects (which is the kind of uncertainty here in question) or to uncertainty as regards the qualification for membership of the class. If and so far as the former kind of uncertainty was meant, the view he expressed was, in the appellants' submission, erroneous.

We confess to some sympathy for the appellants' argument, which has about it an attractive air of common sense, but we do not think that it can be allowed to prevail. We think the submissions made on behalf of the Crown, to the effect that the trust is not one which the court could control or execute, and that this objection cannot be met by urging the improbability of assistance by the court ever becoming necessary, are well founded. We also agree with the further submission on the same side to the effect that the court would not be executing the trust merely by ordering a change in the trusteeship. We are satisfied that the "relations" cases are in a class by themselves and provide no assistance in the present case, and that it would not be possible here for the court to create an arbitrarily restricted trust to take effect in default of distribution by the trustees. There is nothing in this case comparable to the two possible meanings of the term "relations."

In our view, the construction placed on behalf of the Crown on the above-quoted observations of Tomlin J. in *In re H. J. Ogden*[15] is the right one, and we see no reason for questioning the correctness of those observations of that eminent judge. On the contrary, Tomlin J.'s view, which we take to be that a trust for such members of a given class of objects as the trustees shall select is void for uncertainty, unless the whole range of objects

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[15] [1933] Ch. 678.

C. A.
1954

INLAND REVENUE COMMISSIONERS
v.
BROADWAY COTTAGES TRUST.
SAME
v.
SUNNYLANDS TRUST.

eligible for selection is ascertained or capable of ascertainment, seems to us to be based on sound reasoning, and we accept it accordingly.

We cannot assent to the submission made for the appellants to the effect that the settlor in the present case at least succeeded in conferring on the trustees an irrevocable power (as distinct from a trust) to appoint income to any one or more of the "beneficiaries," including the two appellant institutions, so that any sums appointed to them under such power became their income for the purpose of recovering tax. We do not think that a valid power is to be spelt out of an invalid trust. If the trust declared by clause 8 of the settlement is void for uncertainty, then the trustees do not hold the income in question upon that trust but (by way of resulting trust) in trust for the settlor, with no power to dispose of it in any manner otherwise than by paying it to, or as directed by, the settlor. The settlor must be taken to have authorized any payments heretofore made by the trustees (of whom he himself is one) in purported execution of the invalid trust, but there the matter ends.

Wynn-Parry J., in our view rightly, held himself bound by *In re H. J. Ogden* [15] and *In re Gestetner Settlement* [16] to decide the case in favour of the Crown. Mr. Pennycuick, for the appellants, criticized his judgment for referring to the "relations" cases as instances of powers of distribution as distinct from trusts for distribution, and therefore irrelevant to the present case. This description of the "relations" cases was perhaps not quite accurate, but for the reasons we have endeavoured to state we agree with Wynn-Parry J. that they have no application here. We are accordingly of opinion that these appeals fail and should be dismissed.

Appeals dismissed. Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue; Boxall & Boxall for Wilson & Wilson, Kettering.*

B. A. B.

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[15] [1933] Ch. 678.

[16] [1953] Ch. 672.

BRITISH NYLON SPINNERS LD. *v.* IMPERIAL CHEMICAL INDUSTRIES LD.

1954
June 23, 24;
July 9.

Danckwerts J.

[1952 B. No. 3747.]

Conflict of Laws—Jurisdiction—Contract—English contract to grant patent licences—Order by foreign court directing cancellation of rights under English contract—Injunction preventing obedience to foreign court order—Extraterritorial jurisdiction—Comity.

The defendants, an English corporation, were ordered by a foreign court, to whose jurisdiction they were subject, to cancel an existing agreement with a foreign company and to reassign to that company certain patents and rights thereunder previously assigned to the defendants for registration in the United Kingdom. They were also forbidden by the same order to make any disposition of the assigned patents, unless they obtained from the grantee under such disposition an undertaking to hold them subject to a condition which involved the free import into any country—including the United Kingdom—of goods manufactured in accordance with the assigned patents.

Before the making of the order of the foreign court, the defendants had entered into a contract in England with the plaintiffs, an independent English corporation not subject to the jurisdiction of the foreign court, to grant them licences to exercise and practise all the inventions covered by the assigned patents within defined territories. At the date of the said order, the patents had not been formally registered and no licences had been granted under the English contract.

Shortly before the making of that order, the plaintiffs issued a writ against the defendants, seeking specific performance of the contract, and asking for an injunction to restrain the defendants from reassigning the patents in obedience to the order of the foreign court. Upjohn J. granted an interlocutory injunction until judgment in the action or further order. On appeal by the defendants (see *British Nylon Spinners Ld.* v. *Imperial Chemical Industries Ld.* [1953] Ch. 19; [1952] 2 T.L.R. 669; [1952] 2 All E.R. 780), the Court of Appeal affirmed the decision of Upjohn J. and continued the injunction.

The action having come on for hearing:—

Held, that, notwithstanding the order of the foreign court, the defendants were bound by English law to perform the contract, and that there would therefore be an order for specific performance of the contract and an injunction restraining the defendants from doing anything to the contrary until the exclusive licences had been registered in the appropriate registry.

Held, also, that there did not appear to be any difficulty in regard to comity between the courts of the two countries in the present case, and that the principle of comity appeared to have been

1954

BRITISH NYLON SPINNERS LD. *v.* IMPERIAL CHEMICAL INDUSTRIES LD.

specifically recognized and provided for in the judgment of the judge in the foreign court.

Kleinwort, Sons & Co. v. *Ungarische Baumwolle Industrie Aktiengesellschaft* [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38, and *British Nylon Spinners Ld.* v. *Imperial Chemical Industries Ld.* (supra) followed.

WITNESS ACTION.

By an agreement made on December 31, 1946, between the defendants, Imperial Chemical Industries Ld., and an American corporation, du Pont de Nemours & Co. Inc., the latter agreed to assign to the defendants certain patents and applications for patents scheduled to the agreement, such assigned patents to be registered as British patents in the United Kingdom.

On March 5, 1947, the defendants entered into a contract in England with the plaintiffs, British Nylon Spinners Ld., an English corporation. The plaintiffs claimed that under this contract they had a licence or the right to be granted a licence to exercise and practise within a defined field all the inventions covered by the patents and applications for patents in the schedule to the agreement of December 31, 1946, between the defendants and the American corporation.

In June, 1952, the plaintiffs asked the defendants' solicitors to execute formal licences under the assigned patents to enable the plaintiffs to register them and were informed that, owing to the existence of legal proceedings in the United States, the defendants could not execute any documents relating to the patents in question.

On July 30, 1952, in the United States District Court of New York, his Honour Judge Sylvester J. Ryan delivered a final judgment in an action brought by the United States of America against the defendants, du Pont de Nemours & Co. Inc., and others under the anti-trust law known as the Sherman Act: *United States of America* v. *Imperial Chemical Industries Ld. and Others.*[1] The plaintiffs were not parties to those proceedings.

By a clause in that judgment the United States court ordered that the agreement of December 31, 1946, between the defendants and du Pont de Nemours & Co. Inc. be cancelled and that the defendants should reconvey within ninety days all the patent rights assigned to them under that agreement.

Other clauses in the judgment forbade any disposition of foreign patents by the defendants unless they obtained from the grantee an undertaking in writing to hold licences subject to the right of American manufacturers to import goods manufactured in accordance with the patents freely into any foreign country.

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[1] U.S. District Court for the Southern District of New York [1952] Civil Action No. 24–13.

The plaintiffs had, on July 24, 1952, issued a writ claiming declarations as to their rights to licences, and asking for an order that the defendants should execute formal grants of those licences, and for specific performance of the contract of March 5, 1947. They also asked for an injunction to restrain the defendants from assigning or dealing with or parting with any of the patent rights in question in obedience to the order of the United States court.

On August 16, 1952, Upjohn J. granted an interlocutory injunction to restrain the defendants from assigning the patents until judgment or further order, and on October 16, 1952, his decision was affirmed by the Court of Appeal (see *British Nylon Spinners Ld.* v. *Imperial Chemical Industries Ld.*,[2] where arguments on behalf of both parties are set out).

Charles Russell Q.C. and *T. G. Roche* for the plaintiffs.

Sir Andrew Clark Q.C., *G. W. Tookey Q.C.* and *Rodger Winn* for the defendants.

Cases referred to in argument: *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft*[3] and *Foster* v. *Driscoll*.[4] Dicey's Conflict of Laws, 6th ed., p. 607, was also referred to.

Cur. adv. vult.

July 9. Danckwerts J. This is an action brought by British Nylon Spinners Ld. against Imperial Chemical Industries Ld. Each of the parties is an English corporation formed under the provisions of the Companies Acts. The object of the action is to compel the defendant company to grant licences in respect of certain British patents, relating (amongst other things) to nylon yarn, which are now owned by the defendant company. The contract which it is sought to enforce is a contract made by a letter written on behalf of the defendant company and dated March 5, 1947, by which an earlier agreement in writing between the parties and dated January 5, 1940, was modified or superseded.

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[2] [1953] Ch. 19; [1952] 2 T.L.R. 669; [1952] 2 All E.R. 780.

[3] [1939] 2 K.B. 678; 55 T.L.R. 814; [1939] 3 All E.R. 38.

[4] [1929] 1 K.B. 470; 45 T.L.R. 185.

The parties, therefore, are both English corporations and the contract on which their rights depend is a contract made in England and regulated by English law, as the proper law of that contract.

The plaintiff company was incorporated on January 1, 1940, for the purpose of carrying out a joint venture of the defendant company, Imperial Chemical Industries Ld., and another English company, Courtaulds Ld. These two companies, under the provisions of the articles of the plaintiff company, were to own the share capital in equal shares; of the board of directors, five were to be nominees of each of the two companies, I.C.I. and Courtaulds. By modifications made at a later date, three additional directors were appointed, who were to be the nominees of I.C.I. and Courtaulds jointly. So long, therefore, as they acted in agreement, I.C.I. and Courtaulds, together, could control the plaintiff company absolutely, but neither of them alone could control the affairs of the company. I.C.I. alone could not force its will upon the plaintiff company. In case of dispute, in effect, the three neutral directors would have to exercise their functions in the interests of the plaintiff company only. The business of the plaintiff company is (as its name suggests) that of producers of and dealers in multifilament yarns and staple fibres, threads and sewing threads, derived from nylon polymers and similar substances.

The patents, which are now the property of I.C.I., were previously the property of a corporation, formed under the laws of Delaware in the United States of America, called E. I. du Pont de Nemours & Co., and between the I.C.I. and this American corporation there has been a great measure of co-operation in the development of these important inventions, to which the patents relate. Co-operation, though beneficial in many respects, may, from another aspect, be regarded as tending to produce a monopoly. At any rate, proceedings were taken in the United States Federal Court for the Southern District of New York against I.C.I. and du Pont and a number of other corporations and their officers under the Sherman anti-trust law of the United States of America, in which an illegal conspiracy between those corporations and individuals was alleged, which resulted in an order of his Honour Judge Sylvester Ryan on July 30, 1952.

The difficulties which exist in the present case arise out of that order, and these have already been the subject of interlocutory proceedings in this action, in which an injunction designed to prevent frustration of the relevant contract was granted against I.C.I. by Upjohn J. on August 13, 1952, and his decision was affirmed by the Court of Appeal on October 16, 1952, though the order was varied, by consent, in an immaterial respect, by an order made by Vaisey J. on November 15, 1953. Those interlocutory proceedings are reported, *British Nylon Spinners Ld.* v. *Imperial Chemical Industries Ld.*,[1] but the report in [1953] Ch. 19 incorrectly states that the writ in this action was issued after the making of the order in the American court. In fact, the writ was issued on July 24, 1952, before the date of the order.

The defendant company, I.C.I., have in fact no wish to break their contract with the plaintiff company, but they are apprehensive that, if they carry it out, they will be guilty of a disregard of the terms of the order of the United States court, and may be involved in penal proceedings of some kind in the United States of America. They have been put in an even more embarrassing position by the desire of the United States court that they should fully and fairly present in this action all the facts on which the judgment of the United States court was founded, and which appear to have included matters of evidence which would not be admissible as evidence against the plaintiff company, except possibly in proceedings in which a claim of conspiracy was formulated against the plaintiff company and others. Sir Andrew Clark did his best to carry out the moral obligation cast on his clients in this way (no actual order or direction was made in the United States court in this respect), but he found great difficulty in supporting the admission in this action of evidence consisting largely of internal communications between the directors or officers of I.C.I., and I was unable to allow such evidence to be admitted. It should be made clear that, while I.C.I. were effectually joined as a party in the proceedings in the United States Federal Court, the plaintiff company were not a party in those proceedings and are in no way bound by the order of the United States court.

It is now necessary for me to go into the facts and the history of the case in more detail. By an agreement in writing dated March 30, 1939, between du Pont and I.C.I., du Pont granted to I.C.I. licences in respect of the patents which were exclusive for the countries in the British Commonwealth (except Canada and Newfoundland) and in the Irish Free State, Egypt, Palestine, Iran and Irak and their colonies, protectorates and mandated territories, and were non-exclusive for certain other countries. By an agreement in writing dated January 5, 1940, between I.C.I. and the plaintiff company (in which the material parts of the above-mentioned agreement of March 30, 1939, the "du Pont nylon agreement," were scheduled, and it was recited that I.C.I. had agreed to grant to the plaintiff company "a manufacturing sub-licence under such of the du Pont inventions comprised in the du Pont Nylon agreement as related to "the production treatment or use of multifilament yarns and "staple fibres made from nylon polymers"), I.C.I. granted to the plaintiff company "a manufacturing sub-licence as defined "in article II of the du Pont Nylon agreement" (which was to be exclusive and non-exclusive for the respective territories already mentioned) "to exercise and practise such inventions" within the defined field of the agreement and "with the free and "unrestricted right to grant sub-licences to its customers under "any inventions in the sub-licence field in so far as they relate "to the use or treatment of multifilament yarns or staple fibres "in a commercially finished form."

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[1] [1953] Ch. 19.

By article II of the du Pont Nylon agreement of 1939 du Pont had granted to I.C.I. a licence "to exercise and "practise" the inventions, and the article contained a provision that I.C.I. should have the free and unrestricted right to grant sub-licences to its customers within the I.C.I.'s licensed territory and that the said sub-licences should be referred to as "customers' sub-licences." I.C.I. was to have the right to grant other sub-licences only on prior written approval of du Pont, which approval du Pont agreed it would not unreasonably withhold, and it was stated that such other sub-licences should thereinafter be referred to as "manufacturing "sub-licences."

One of the points which I.C.I. were compelled to put forward in the present action, and which was apparently an argument suggested by those advising du Pont, was that the sub-licence obtained by the plaintiff company from I.C.I. under these agreements was only a manufacturing licence of a nature less than a full licence "to make use exercise and vend," and that the use of the words "to exercise and practise" instead of the usual more numerous words supported this conclusion. But it is plain that this contention has no substance. It is clear that "a manufac- "turing sub-licence" is simply a name used for convenience in the agreement which includes all sub-licences other than the more limited "customers' sub-licence," and is without any limitation of the kind suggested. The words "exercise and practise" are merely used, as it seems to me, as a shortened form designed to cover all the ordinary words, and this view is supported by a passage, to which I was referred, in Terrell and Shelley on Patents, 9th ed., p. 258, in which it is stated that "a licence "to 'use and exercise' conveys the fullest rights, including that "of importation." I do not think that there is any difference in effect between the words "use and exercise" and the words "exercise and practise."

There was also a tripartite agreement of January 5, 1940, between I.C.I., Courtaulds and the plaintiff company, which dealt with the issue of shares in the capital of the plaintiff company and certain other matters which might be material in the event of the manufacture of nylon yarns being undertaken in countries other than the United Kingdom.

On January 6, 1944, the proceedings were instituted under the Sherman Anti-Trust Act of 1890 in the United States District Court for the Southern District of New York. The proceedings went to trial on April 3, 1950, and the trial concluded on June 30, 1950. The issues were finally submitted to the court for determination in November, 1950. His Honour Judge Sylvester Ryan delivered an opinion on the facts on September 28, 1951, an opinion on remedies on May 16, 1952, and a final judgment on July 30, 1952, which was modified by him subsequently in certain minor respects.

Meanwhile, I.C.I. and du Pont, who were both defendants in those proceedings, naturally suffered anxiety as to the result of the proceedings in regard to their agreements and co-operation. No doubt as a result of this those two corporations entered into a further agreement in writing on December 31, 1946. By this agreement the agreement of March 30, 1939, was cancelled and terminated; du Pont assigned to I.C.I. the entire right, title and interest in and to the patents which were the subject of the licences regulated by the former agreement; the provisions of the previous agreement for the exchange of information and knowledge were brought to an end, and the basis and rates of the royalties were varied. Thus the position of I.C.I. in regard to the patents was substantially changed. I.C.I., instead of being simply licensees, now became the owner of the patents, and, accordingly, the plaintiff company were no longer sub-licensees, and the agreement of 1939 by reference to which their rights had been largely regulated had come to an end. Some fresh arrangement between I.C.I. and the plaintiff company was necessary.

The plaintiff company were not a party in the United States proceedings and they were not a party to the discussions and arrangements which took place between du Pont and I.C.I. Certain of the directors of I.C.I. were also directors of the plaintiff company, but under English law, at any rate, knowledge acquired by them as directors of I.C.I. cannot be treated as the knowledge of the plaintiff company. Naturally, the directors of the plaintiff company, however, had some knowledge of the proceedings in the United States, and on June 3, 1946, a letter was written on behalf of the plaintiff company to I.C.I. inquiring as to the effect of the proceedings on the relation between du Pont and I.C.I. On June 27, 1946, Mr. Lutyens replied on behalf of I.C.I., enclosing a letter from the legal department of I.C.I., in which the view is expressed that, if the American proceedings resulted in a decree, by consent or otherwise, some modification of the nylon licence rights might be necessary, though the fact that the plaintiff company had sub-licence rights and were not before the court would involve the court in difficulty in settling a decree which could be effectively observed. The only other correspondence with the plaintiff company before the agreement of December 31, 1946, between du Pont and I.C.I. relates to a letter from Mr. Quig of I.C.I. telling Mr. Bagnall (of the plaintiff company) that du Pont felt obliged to modify the Nylon Agreement and had put two proposals before I.C.I. which they were considering.

The agreement of December 31, 1946, apparently was concluded between du Pont and I.C.I. without further communication to the plaintiff company. On March 5, 1947, a letter was written to the plaintiff company by Mr. Ridsdale, the head of the legal department of I.C.I., in which he said: "Now that the new "Nylon Agreement has been concluded between du Pont and "I.C.I., I am able to advise you of certain changes which will "affect the licence agreement dated January 5, 1940, between "I.C.I. and B.N.S., and also the co-operation agreement of the "same date between I.C.I., Courtaulds and B.N.S. In due "course it will be necessary to enter into formal agreements "covering these alterations but as these agreements will take a "little time to prepare I am writing you now to let you know "the position. As regards the licence agreement I think it is "easier to deal with the changes in the following way. 1. You "are aware, I think, that I.C.I. have acquired by assignment "from du Pont a large range of patent rights, including those the "subject of the licence agreement. This will mean that instead "of holding a sub-licence from I.C.I. under these patent rights "you will be entitled to a direct licence from I.C.I. who are now "the owners of the rights in question." The letter then went on to explain the agreement for the termination of the exchange of technical information after December 31, 1946, and the variation of the royalty provisions, and the letter said: "There will be a "number of other minor changes to be made but I do not think "it is necessary to go into these in this letter." The terms of this letter were never expressly accepted in writing, but it is common ground that it was acted on and accepted by conduct on behalf of the plaintiff company, and this is the contract which I am asked to enforce. Draft documents were prepared but were never finally agreed in view of the difficulties felt by I.C.I. as a result of the United States proceedings. But in June, 1952, the plaintiff company required licences to be granted by I.C.I., so that they could be registered in respect of the patents, and on July 24, 1952, the writ in this action was issued, six days before the effective judgment given by the Federal District judge in New York on July 30, 1952.

Now, though this case involves some difficult questions of jurisdiction and possibilities of conflict between this court and the United States court in New York, it is natural and proper that each court should recognize the difficulties of the judge of the other jurisdiction in dealing with matters which involve the nationals or legal creations of another sovereign State and the application of different laws in a situation which is not precisely the same, therefore, in its circumstances. His Honour Judge Sylvester Ryan has been exceedingly moderate and courteous in his references to the possible courses which might be adopted by the English court in dealing with the subject-matter of the agreements between the parties, and if I appear to reach different results and different conclusions from those which he has reached, or those which would be the most convenient for the carrying out of the decree which he has felt bound to make, this is not due to my unwillingness to co-operate, and the divergence is caused by the differences in the legal situation in our respective jurisdictions.

The judge was applying an enactment of Congress, which has no application to the United Kingdom, of course, and I am dealing with a contract between two British corporations in regard to

1954

BRITISH NYLON SPINNERS LD. v. IMPERIAL CHEMICAL INDUSTRIES LD.

Danckwerts J.

British property, that is, the patents, and involving solely matters which are to be carried out in the United Kingdom. With these observations in mind, it is necessary to consider the details of the United States judge's findings and directions.

In his opinion on the facts of September 28, 1951, the judge decided that documents tendered on behalf of the United States were admissible. He said: "If a conspiracy has been shown "prima facie by evidence aliunde, declarations of co-conspirators "in furtherance of the conspiracy are admissible against all. "Since we have found that a conspiracy has been so proven, the "sole issue is whether the challenged documents are declarations "in furtherance of the conspiracy. Because of the nature of the "conspiracy, and of its participants, we conclude that they are."

The plaintiff company were not a party in those proceedings, and in the present action there is no issue of conspiracy, and it is clear, therefore, that I should not be justified in admitting the evidence admitted in the United States case which related to the declarations or internal dealings of the parties in the United States proceedings. Nor can I accept any conspiracy as being proved by such evidence for the purpose of the present action. The judge stated his conclusion as to the 1939 agreement thus: "We "find that the nylon agreement of 1939 stands condemned as "within the patents and processes agreements. We find that the "nylon agreement of 1939 was illegal because it was part of a "licensing scheme, accomplished by concerted action of du Pont "and I.C.I. for allocation of territories and pooling of patents "embracing the whole of the nylon manufacturing industry and "the whole of the nylon technology."

In reference to the agreement of December 31, 1946, the judge said: "We find that du Pont, desiring to minimize "the possibility of nylon being included in any decree that "might be entered in this suit because of the questionable "legality of some provisions of the earlier nylon agreement under "the anti-trust laws of the United States, sought and secured "from I.C.I. a new nylon agreement." It seems to me, however, that such a course might be regarded not so much as an attempt to evade the effect of the Anti-Trust Act as an intention to rearrange the affairs of the corporations so as to secure compliance with the principles of the same statute, and so avoid offending against the law. I should add that Sir Andrew Clark referred me to those passages in support of the argument which he felt bound to advance, that this court ought not to give any relief in respect of an agreement which was part of a concerted plan to carry out some transaction contrary to the laws of a friendly State.

In his opinion on remedies, given on May 16, 1952, the judge expressed his purpose as follows: "The Government "does not seek a decree directing I.C.I. to grant compulsory "licences of its British patents. The Government requests that "I.C.I. be required to grant immunity under its foreign patents "which correspond to the United States patents which we have "made subject to compulsory licensing. Such a provision was "included in paragraph 7 of the final decree in *National Lead* (63 "Federal Supplement, 495, 534), and left undisturbed by the "Supreme Court. We have had testimony offered on behalf of "I.C.I. by an expert in British law that a provision for granting "immunities is contrary to British public policy and that a "British court will not enforce such a provision in the judgment "of a court of a foreign jurisdiction. As to this, we observe that "acting on the basis of our jurisdiction in personam, we are "merely directing I.C.I. to refrain from asserting rights which "it may have in Britain, since the enforcement of those rights "will serve to continue the effects of wrongful acts it has "committed within the United States affecting the foreign trade "of the United States." Later the judge observed: "Our "power so to regulate is limited and depends upon jurisdiction "in personam; the effectiveness of the exercise of that power "depends upon the recognition which will be given to our judgment as a matter of comity by the courts of the foreign sovereign "which has granted the patents in question." On page 25 he said: "British Nylon Spinners is not before this court; although "they were knowing participants in acts designed to thwart the "granting of full relief, we may not direct our decree to them. "The lack of majority stock ownership in I.C.I. likewise prevents control of the future acts of British Nylon Spinners by "this means; however, we are not without some remedy still "available."

I must observe that so far as the evidence admissible in this court is concerned, there is no evidence of any participation by British Nylon Spinners in acts designed to thwart the granting of full relief. On the contrary, it appears that they accepted a situation which was presented to them as an accomplished fact after it had been arranged by du Pont and I.C.I. Courtaulds, the other shareholder, interested equally with I.C.I. in British Nylon Spinners, also were not before the United States court or amenable to a decree of that court. The statement by the learned judge that "throughout all these negotiations it appears "that B.N.S. was advised of the dealings between I.C.I. and "du Pont concerning the British Nylon patents" is not supported by the evidence before me. The whole of the learned judge's observations on that page is based on an assumption that B.N.S. were party to a conspiracy to evade some law of the United States and were not an innocent party. The learned judge then said: "We do not hesitate therefore to "decree that the British nylon patents may not be asserted "by I.C.I. to prevent the importation of nylon polymer and "of nylon yarn into Great Britain. What credit may be "given to such an injunctive provision by the courts of Great "Britain in a suit brought by B.N.S. to restrain such importa-"tions we do not venture to predict. We feel that the possibility "that the English courts in an equity suit will not give effect "to such a provision in our decree should not deter us from "including it. In any event it appears that B.N.S. would have "the right under section 63 of the Patent Act of 1949, as the "exclusive licensee, to bring suit for infringement against an "importer of yarn and staple fibre. There would then be a "speedy determination of the effectiveness of the immunity pro-"vision of the decree with reference to these products. If the "British courts were not to give credit to this provision, no "injury would have been done; if the holding of the British "courts were to the contrary, a remedy available would not "have been needlessly abandoned. Specifically, with relation to "nylon, the judgment shall provide that the agreement between "du Pont and I.C.I. concerning the British nylon patents shall "be cancelled; a new agreement may be executed by the parties "granting a non-exclusive licence, providing for the payment of "royalties and removing all contractual barriers to exportation."

It is evident that the learned judge was far from certain that the English courts would accept the validity of his order, and recognized that these provisions in his order would be entirely without effect unless they were accepted and enforced by the English court.

The learned judge's final judgment was not given until July 30, 1952, and by article XIV of it it was provided that the judgment should become effective forthwith (with the exception of certain articles). It appears, therefore, that there was no effective judgment until this date and the judgment had no retrospective effect. By article II, the opinions of the court filed on

September 28, 1951, and May 16, 1952, were certified and adopted as the court's findings of fact and conclusions of law.

In article IV, para. 3, there appears this curiously expressed provision (the effect of which will be discussed later): "3. No provision of this judgment shall operate against I.C.I. for action taken in compliance with any law of the United States Government, or of any foreign government or instrumentality thereof, to which I.C.I. is at the time being subject, and concerning matters over which, under the law of the United States, such foreign government or instrumentality thereof has jurisdiction."

Article VI should be mentioned: "Jurisdiction of this cause and of the parties is retained for five years from the date of entry of this judgment for the purpose of enabling the court, upon due notice and hearing, to modify the relief provided by this final judgment, or to grant such other or additional relief as appears to be required to accomplish the purposes of this judgment and to terminate the restraints on United States trade and commerce which have been found to have been created or imposed by acts of the defendants or any of them."

I understand that these provisions or the provisions of article XVI (hereinafter mentioned) enable the court to modify or interpret the terms of the final judgment, and this was in fact done by the court. The jurisdiction thus retained seems to go further than the "liberty to apply" often contained in an order of an English court.

Article VII, which is entitled "Cancellation of agreements," by para. 1 provides as follows: "1. The contracts and agreements listed in Schedule A of this judgment are adjudged to be unlawful under section 1 of the Sherman Act and are hereby cancelled and terminated. Except as otherwise provided in articles VIII and XI of this judgment, defendants shall not further perform or enforce any of the provisions of the contracts and agreements, and of any amendatory or supplemental contracts and agreements."

The du Pont Nylon Agreement of March 30, 1939, is included among the agreements listed in Schedule A, but the agreement of December 31, 1946, is not among them. It is, however, referred to in para. 5 of the same article, which is in these terms: "5. The Nylon Agreement between du Pont and I.C.I., dated December 31, 1946, is hereby cancelled and terminated and neither du Pont nor I.C.I. shall further perform, enforce or claim any right under any of the provisions thereof. I.C.I.

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" shall, within ninety days from the date of this judgment, " reassign to du Pont all of the foreign patents and pending " applications assigned to I.C.I. by du Pont pursuant to the said " agreement and, simultaneously with such reassignment, du " Pont shall grant to I.C.I. exclusive licences under all of the " said foreign patents so reassigned, conditioned upon the payment by I.C.I. to du Pont of the royalties set forth in the " said agreement dated December 31, 1946. I.C.I. and du Pont " and their respective customers, licensees and sub-licensees " shall have, without the payment of additional royalties, the " same immunities under patents and foreign patents as are " provided for in the said agreement dated December 31, 1946. " The obligation on I.C.I. to hold du Pont nylon technical " information confidential, as provided in the said agreement, " shall remain unimpaired and in force. I.C.I. shall continue to " have the territorially unlimited right to use such technical " information in the manufacture of nylon, as provided in the " said agreement." This paragraph of the judgment bears a side-note that " On October 27, 1952, the court orally stayed this " assignment provision pending resolution of the B.N.S.-I.C.I. " litigation in England." This apparently followed from the interlocutory injunction confirmed by the Court of Appeal in England on October 16, 1952.

Article IX, para. 4, is in the following terms: " 4. Until June " 30, 1977, to the extent they have the legal right to do so, du " Pont and I.C.I. shall: (a) grant to any person (including du " Pont and I.C.I.), making written request therefor, in consideration of a reasonable royalty, an unrestricted, non-exclusive " immunity under any foreign counterpart of any existing or new " patent to import into any foreign country any common " chemical product lawfully manufactured in the United States."

Para. 13 of the same article provides as follows: " 13. du " Pont and I.C.I. shall not: (a) make any disposition of existing " or new patents or rights thereunder, which deprives them of " the power or authority to issue the licences or to grant the " immunities required by this judgment, unless the defendant " requires, as a condition of the sale, assignment or grant, that " the purchaser, assignee or licensee shall observe the provisions " of this article of this judgment with respect to the patent or " rights so acquired, and the purchaser, assignee or licensee shall " file with this court, prior to the consummation of the said " transaction, a written undertaking to be bound by the provisions of this article of this judgment with respect to the

" patents or rights so acquired; (b) make any disposition of " foreign patents or rights thereunder, which deprives them of " the power or authority to issue the grants of immunity required " by this judgment, unless the defendant requires in writing as " a condition of the sale, assignment or grant, that the pur- " chaser, assignee or licensee agrees to receive and hold its rights " subject to any grant or grants of immunity given by the " defendant pursuant to the provisions of this judgment. Copies " of all such written agreements shall be filed by the defendant " with the Attorney-General within thirty days after demand by " the Attorney-General for the filing thereof."

Article XVI contains a further provision in the nature of liberty to apply: " Jurisdiction of this cause, and of the parties " hereto, is retained by the court for the purpose of enabling any " of the parties to this judgment, or any other person, firm or " corporation that may hereafter become bound thereby in whole " or in part, to apply to this court at any time for such orders, " modifications, vacations or directions as may be necessary or " appropriate (1) for the construction or carrying out of this " judgment and (2) for the enforcement of compliance " therewith."

The question, therefore, is whether this judgment of the United States Federal Court provides a defence for I.C.I. in this action for specific performance, and whether by reason of that judgment I should refuse to grant specific performance of the contract which has admittedly been made between the plaintiffs and the defendants.

The matter was, of course, considered by Upjohn J. and the Court of Appeal on the application for an interlocutory injunction, and the view taken by the Court of Appeal is expressed by the following passage in the judgment of the Master of the Rolls [2]: " The subject-matter of the contract of December, 1946, is a " number of English and Commonwealth patents. An English " patent is a species of English property of the nature of a chose " in action and peculiar in character. By English law it confers " certain monopoly rights, exercisable in England, on its pro- " prietor. A person who has an enforceable right to a licence " under an English patent appears therefore to have at least some " kind of proprietary interest which it is the duty of our courts " to protect. And, certainly so far as the English patents are " concerned, it seems to me, with all deference to his Honour's

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[2] [1953] Ch. 19, 26.

"judgment, to be an assertion of an extraterritorial jurisdiction "which we do not recognize for the American courts to make "orders which would destroy or qualify those statutory rights "belonging to an English national who is not subject to the "jurisdiction of the American courts."

The view thus asserted by the Master of the Rolls seems to me to be entirely in accordance with the decision of the Court of Appeal in *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft*,[3] in which du Parcq L.J. said: "One starts with the rule that English law is the law which "governs the performance of this contract. An elementary principle of English law is that people should keep their contracts "and carry them out." In that case the Court of Appeal gave judgment against a Hungarian bank on a claim by London bankers to recover a sum of money from the Hungarian bank, notwithstanding that legislation in Hungary made it illegal for Hungarian subjects to pay money outside Hungary without the consent of the Hungarian National Bank. In the case before me there is no doubt that English law is the law which governs the performance of the contract made by the plaintiffs and the defendants. Furthermore, in this case, both the parties are British nationals, and so in this respect the situation is easier than in *Kleinwort's* case,[3] in which the defendant was a Hungarian bank.

It was argued on behalf of the defendants that this court would not enforce a contract which involved the deliberate violation of the laws of a friendly country, and I was referred to Dicey's Conflict of Laws, 6th ed., p. 607, and *Foster* v. *Driscoll*,[4] which was a case of a contract, the object of which was the illegal importation of whisky into the United States of America. There is no evidence before me that the object of the contract of March 5, 1947, was to do anything contrary to the law of the United States of America and no evidence that the plaintiff company was party to or had knowledge of any conspiracy contrary to the law of the United States when that contract was entered into. It is impossible for me to accept the conclusions of the United States court as findings of fact binding in this action against the plaintiff company who were not a party to the American proceedings. Consequently, it seems to me that *Foster* v. *Driscoll*[4] is in no way applicable to the present case, and I should apply the principle laid down by the Court of Appeal in *Kleinwort's* case.[5]

[3] [1939] 2 K.B. 678, 696.

[4] [1929] 1 K.B. 470.

[5] [1939] 2 K.B. 678.

There are, however, further considerations which also lead to the same result. I had the advantage of the evidence of Mr. Marshall Konopak Skadden, a member of the Bar of the State of New York, practising in the relevant United States courts. His evidence was that the British court would be accepted under the law of the United States as an appropriate court having jurisdiction for the enforcement of the contract under consideration in the present case; further, his evidence was that, if I.C.I., though prohibited from doing so by a judgment of a court in the United States, complied with an order of a British court and executed a licence, this would not be treated by an American court as a contempt of court; and Mr. Skadden referred to a number of decisions of American courts in support of these propositions. This evidence indicates to me that the American courts would not regard a judgment of this court in the present circumstances enforcing against I.C.I. the contract of March 5, 1947, as in any way inappropriate, and there does not appear, therefore, to be any difficulty in regard to comity between the courts of the two countries in this case.

Furthermore, it would appear that the judgments of his Honour Judge Sylvester Ryan recognized this principle and were intended to provide for and limit his own judgment in this very respect. This appears to be the intention of article IV, para. 3, of the judgment of July 30, 1952: "No provision of this judgment shall operate against I.C.I. for action taken in compliance with any law of the United States Government, or of any foreign government or instrumentality thereof, to which I.C.I. is at the time being subjected, and concerning matters over which, under the law of the United States, such foreign government or instrumentality thereof has jurisdiction."

"Instrumentality" of a government is an inaccurate, and indeed repellent, description of an English court. But it appears none the less that the learned judge was using the word in this manner from his observations on the occasions of further applications which were made to him. On October 27, 1952, his Honour said: "The court understands that and expects I.C.I. to obey all orders and regulations that I have enumerated, of all Government agencies and of the courts having jurisdiction over the matter on which they seek a ruling. . . . And that is provided for in another section of the decree, I forget which one"; and, on counsel referring him to article IV, para. 3, he added: "I think that provision covers this situation."

On the same occasion his Honour said: "Suppose they did, "it was a suit in the nature of a declaratory action and I would "not see anything contemptuous about such an act. Both I.C.I. "and British Nylon Spinners I think are well within their rights "to have it judicially determined by the courts of Great Britain "and as to just what effect will be given to the provisions of the "decree of this court which affect the British patents. I do not "find anything wrong with that at all."

A further instance is, I think, to be found in the limitation contained in article IX, para. 4, in which "until June 30, 1977, "to the extent they have the legal right to do so," du Pont and I.C.I. are directed to make certain grants of immunities. It was argued by Sir Andrew Clark that this limitation of the order could not apply to the plaintiff company's rights under the agreement of March 5, 1947, because these were only equitable and not legal. But I do not read the language of the judgment in that way. I regard the words "to the extent they have the legal right to do "so" as equivalent to "so far as they may lawfully do so," that is, not in breach of their obligations, including the equitable as well as the legal rights of other persons, so long as such rights are enforceable in a court of appropriate jurisdiction. Consequently, the prohibition of dispositions of foreign patents or rights thereunder, which deprive them of the power or authority to issue the grants of immunity required by the judgment, in article IX, para. 13 (*b*), is similarly limited, as the judgment does not require the issue of grants of immunity which du Pont and I.C.I. may not lawfully grant.

These passages indicate to me that his Honour Judge Ryan has been careful so to limit his judgment that neither his judgment, nor any judgment of mine which the law of England requires me to give, will disturb the comity which the courts of the United States and the courts of England are so anxious and careful to observe.

I would only add that Sir Andrew Clark, as counsel for the defendants, I.C.I., fully carried out to the best of his ability, in somewhat difficult circumstances, the desire expressed by his Honour Judge Ryan that the considerations which led the American court to reach the conclusions and make the order that it did should be before this court.

In the result, my conclusion is that, notwithstanding the judgment of the United States court of July 30, 1952,[6] the defendants,

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[6] U.S. District Court for the Southern District of New York [1952] Civil Action No. 24-13.

I.C.I., are bound by English law to carry out their agreement of March 5, 1947, and I ought to make the declaration which is asked by the amended statement of claim, and grant specific performance of the contract. The order will, therefore, be for specific performance—an order that they shall execute these licences; and an injunction restraining them from doing anything to the contrary until the exclusive licences have been registered in the appropriate registry.

Declaration accordingly.

Solicitors: *Bristows, Cooke & Carpmael; J. W. Ridsdale.*

J. L. D.

In re HOOKER'S SETTLEMENT.
HERON *v.* PUBLIC TRUSTEE AND OTHERS.

1954 Oct. 18.
Danckwerts J.

[1953 H. No. 4687.]

Settlement—Revocation—Jurisdiction—Power of revocation with consent of judge of Chancery Division—No power for private person to impose jurisdiction on court—Application for judge's consent dismissed.
Chancery Division—Jurisdiction.

A private person has no power to impose on a judge of the Chancery Division a jurisdiction which has not been given him by the procedure of the courts or by any statute, and an attempt to do so would be an attempt to make a judge an arbitrator without his consent.

Where, therefore, a settlement contained a clause by which the settlor could revoke the trusts of the settlement with the consent of a judge of the Chancery Division:—

Held, that this was not a proper clause and the summons asking for the consent of the court to a deed revoking the settlement must be dismissed.

In re H.'s Settlement [1939] W.N. 318 applied.
In re Baker [1936] Ch. 61 distinguished.

ADJOURNED SUMMONS.

A settlement executed by the plaintiff, then Catherine Eva Hooker, on October 17, 1917, settled the trust fund on herself for life, and contained a power of appointment among her issue with a provision in default of appointment for a child or children who should attain the age of 21 years, or being daughters marry under that age.

1954

HOOKER'S SETTLEMENT, *In re.* HERON *v.* PUBLIC TRUSTEE.

Clause 7 of the settlement provided: "The settlor may at "any time during her life with the consent of a judge of the "Chancery Division of the High Court of Justice from time to "time by any deed or deeds revoke or vary either wholly or "partially the trusts and powers of and concerning the whole or "any part of the trust fund and of the income therefrom respec- "tively but without derogating from the effect of any previous "exercise of any of the powers hereinbefore contained or declared "of all or any parts of the trust fund and of the income therefrom "respectively."

The plaintiff married Horace Willets Heron on August 18, 1918; he died on January 6, 1953. There was one child of the marriage, the defendant Michael Roger Heron, who was born on April 5, 1922. By this summons the plaintiff asked the court for an order consenting to her execution of a deed dated December 14, 1953, made in pursuance of clause 7 of the settlement revoking the trusts of the settlement. A preliminary point was taken to decide whether the court had jurisdiction to make the order.

J. A. Plowman Q.C. and *Peter Foster* for the plaintiff. There is no reason why the court should not exercise this discretion; they would break no rule of law in so doing. In *In re H. W. Baker*,[1] Farwell J. had to consider a clause under which a settlor had power to revoke the whole trusts of a settlement with the consent of either the trustees or of a judge of the Chancery Division. He was not asked to exercise his discretion in that case, but he does not appear to have thought that a Chancery judge would refuse to exercise his discretion, and he did not say that he thought that such a clause was improper. In *In re H.'s Settlement* [2] Simonds J. made the order asked for, which gives the impression that, although he thought that such a jurisdiction could not have been imposed on him, he did not think that it was wrong, if it seemed proper to him in the circumstances for a judge to exercise it. It would be proper in the circumstances of the present case for the court to exercise the discretion. [*In re Phillips* [3] and *In re Greaves* [4] were also referred to.]

D. H. McMullen for the Public Trustee.

Milner Holland Q.C. and *W. S. Wigglesworth* for the plaintiff's son. No jurisdiction exists under the Rules of the Supreme

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[1] [1936] Ch. 61.

[2] [1939] W.N. 318.

[3] [1931] 1 Ch. 347.

[4] [1954] Ch. 434; [1954] 1 All E.R. 771.

Court or under any statute to make the order for which the plaintiff asks, and in the absence of such jurisdiction a private person cannot of his own volition impose a jurisdiction on the court to exercise a discretion: see *In re H.'s Settlement,*[5] *per* Simonds J. Were it possible for a private person to impose such a discretion on a Chancery judge, a judge could be made to act as arbiter in domestic disputes. The proper way to have framed this clause would have been to have given the trustees a discretionary power to consent to the revocation of the trusts; such a clause was to be found at the time of the settlement in Key and Elphinstone's Precedents in Conveyancing, 10th ed. (1914), vol. 2, p. 643, and could have been used by the settlor. Trustees always have power to apply to the court if they are in doubt as to the meaning of a clause. As the court does not possess jurisdiction to consent to this deed the summons should be dismissed.

DANCKWERTS J., having stated the facts: The plaintiff, Mrs. Heron, by this application, asks for an order to be made by the court consenting to the execution by the plaintiff of a deed which she made on December 14, 1953, in pursuance of the power which is supposed to be contained in clause 7 of the settlement.

The evidence in the case has not been read, as a preliminary point has been raised as to the jurisdiction of the court to make any order and the validity of the application which has been made by the plaintiff in this case.

In *In re H.'s Settlement,*[1] a rather similar point came before Simonds, J. In that case the settlement contained the following clause: "The settlor may from time to time or at any time by "deed revocable or irrevocable with the consent of the Chancery "Division of the High Court revoke all or any of the trusts "hereinbefore declared and may direct that the part or parts of "the trust fund to which such revocation extends shall be held "in trust for herself absolutely or otherwise as she may think "proper." In that case two sisters who had executed similar settlements had married husbands of considerable means. The court was asked in an application (which was substantially unopposed, as far as I can see) to make an order authorizing revocation under the terms of that provision of the settlement. Simonds J. expressed the view that a settlor was not entitled to make any power or trust exercisable with the consent of the Chancery Division or with the consent of a judge of that division, and he said that the legislature could impose upon the court a duty to exercise a discretion, but in his opinion a private person could not do so. Such a discretion should be made exercisable by trustees, and the court should only be asked to exercise it if the trustees were unwilling or failed to do so. But apparently (for reasons which I do not wholly apprehend) in that case the judge allowed himself to make the order, on the ground that it would be a hardship on the settlors not to do so in the circumstances.

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[5] [1939] W.N. 318.

[1] [1939] W.N. 318.

A clause somewhat similar came before Farwell J. in *In re Baker*,[2] in which Farwell J. (sitting not as a judge of the Chancery Division in that case but as a bankruptcy judge) came to the conclusion that a clause giving the settlor power to revoke the whole of the trusts in the settlement with the consent either of the trustees or of a judge of the Chancery Division was not fraudulent and void under section 172 (1) of the Law of Property Act, 1925. It is true that in his judgment Farwell J. seems to have thought that a judge of the Chancery Division would not have refused to exercise the jurisdiction, and would apparently have considered whether it was for the benefit of the settlor that the power should be exercised, having regard also to the interests of his creditors. In that case, however, Farwell J. was not himself being asked to exercise the jurisdiction, and was merely considering whether a clause—which, it is to be observed, was not in the same form as the present, because it gave the power to the trustees as an alternative to the court—was fraudulent having regard to the interests of creditors.

I have also been referred to two cases of rather a different character, *In re Phillips* [3] and *In re Greaves*,[4] which have nothing to do with the present case.

It seems to me that the view which was expressed by Simonds J. in 1939 is the right view. An ordinary person has not the power, as the legislature has, of course, to impose upon a judge of the Chancery Division a jurisdiction which is not given him by the procedure of the courts or by any statute. It seems to me that this is an attempt to make the judge an arbitrator without his consent. It is to be observed in the present case that there is not even a reference to the Chancery Division, but to "a judge "of the Chancery Division." It is an attempt, apparently, to compel a judge in the Chancery Division, an individual judge, to adjudicate upon a private matter of the parties. It is true that as this is contained in a settlement, at first consideration there seems to be a certain plausibility about a power of revocation of this character, but the matter is capable of greater extension in a very undesirable and improper manner if a settlor be entitled to require the co-operation of a judge of the High Court in this manner, a judge could be compelled to act as arbitrator in commercial disputes or even in a question about a race. It is something wholly unjustifiable which cannot be allowed to pass.

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[2] [1936] Ch. 61.

[3] [1931] 1 Ch. 347.

[4] [1954] Ch. 434; [1954] 1 All E.R. 771.

It is urged that as this settlement was made in 1917, the same consideration which induced Simonds J. in 1939 to give his decision on the case should be applied in the present case, because the settlement was executed long before the case which came before Simonds J. I do not think that that is an admissible argument. If parties choose to put in a settlement a clause which is not valid or proper, they must abide by the result, and, if it is rejected, they must suffer the consequences.

There is, moreover, a further consideration to which Mr. Wigglesworth called my attention, that in Key and Elphinstone's Precedents in Conveyancing (10th ed., vol. 2, p. 643)—which was available in 1917—there was a clause of a different character which left the matter to the trustees, subject to the power which trustees always possess of applying to the court in case of their being in doubt as to whether they should consent to the exercise of the power, and which could have been used by a settlor who wished to provide for circumstances of this kind.

In the result, I have come to the conclusion, therefore, that this is not a proper clause. It is an attempt to compel the adjudication of a matter by a judge in the Chancery Division which is not provided for by the law, and is improper and inconsistent with the proper practice of the courts. Accordingly, the preliminary objection succeeds, and I must refuse to hear the summons any further, and it will be dismissed.

Summons dismissed.

Solicitors: *Burton, Yeates & Hart for Malcolm, Wilson & Cobby, Worthing; Cartwright, Cunningham, Haselgrove & Co.; Edridges & Drummonds, Croydon.*

I. G. R. M.

1954
Oct. 8.

Roxburgh J.

In re BURTON'S SETTLEMENT TRUSTS. PUBLIC TRUSTEE *v.* MONTEFIORE.

[1954 B. 2349.]

Settlement—Hancock v. *Watson, rule in—Accruer clause—Trust fund for two daughters of settlor with gifts over in favour of issue—Direction to treat trust fund as divided—Direction to appropriate moieties as daughters' shares—Share of deceased daughter to accrue to share of survivor—Death of daughters unmarried—No gift over on failure of issue—Rule not applicable.*

Trust and Trustee—Resulting trust.

By a settlement dated April 10, 1919, and made between the settlor and two trustees, the settlor directed his trustees to stand possessed of a trust fund on trust "to divide the trust fund, or "without actual division to treat the same as divided into two "parts and to appropriate one of such parts as the share of" each of his two daughters. It was further provided that the share of each daughter should not vest absolutely in her, but should be retained by the trustees on trust during the life of such daughter to pay the income of such share to her and after her death on trust (as to both capital and future income) for the issue of such daughter as in the settlement mentioned. It was also provided that if the trusts concerning the share of either daughter should fail, such share should "accrue by way of addition to the share of" the other daughter, and should be held on the trusts of her original share or as near thereto as circumstances would admit.

There was no gift over in the event, which happened, of both daughters dying without issue.

On the hearing of a summons taken out to ascertain whether the fund was held (a) on trust in equal moieties for the personal representatives of the two daughters, or (b) on trust for the personal representatives of the last surviving daughter, or (c) on a resulting trust for the personal representatives of the settlor:—

Held, that the directions to divide or treat the fund as divided and to appropriate the parts were mere administrative directions, and did not constitute any such beneficial interest as to bring into effect the rule in *Hancock* v. *Watson* [1902] A.C. 14, particularly in that the accruer clause could not be construed as creating a de novo application of that rule (*In re Litt* [1946] Ch. 154; 62 T.L.R. 303; [1946] 1 All E.R. 314 distinguished) so that there was a resulting trust in favour of the settlor.

ORIGINATING SUMMONS.

By clause 2 of an indenture of settlement, dated April 10, 1919, and made between Arthur Burton (the settlor of the one part) and two trustees (one of whom was the settlor) of the other part, the trustees were directed to stand possessed of a trust fund

1954

BURTON'S SETTLEMENT TRUSTS, *In re.* PUBLIC TRUSTEE *v.* MONTEFIORE.

and of the annual income thereof " upon trust to divide the trust " fund or without actual division to treat the same as divided " into two equal parts and to appropriate one of such parts as " the share of each of them the said two daughters of the settlor— " namely the said Audrey Evelyn Burton and Ida Marion Burton " respectively." Clause 3: " The share of the trust fund of each " of the said two daughters of the settlor shall not vest absolutely " in such daughter but shall be retained by the trustees upon the " trusts following: (i) During the life of such daughter the trustees " shall pay the income of such share to her and so that during " coverture the same shall be without power of anticipation. " (ii) During the minority of such daughter the trustees shall " apply the whole or such part as they in their discretion shall " think fit of the income of such share for or towards her maintenance education or benefit whether there is any other fund " applicable or any person bound by law to provide for such " maintenance or education or not and may pay the same to the " parents or a parent or to the guardian or guardians of such " daughter for the purpose aforesaid without seeing to the " application thereof or after such daughter attains the age of " eighteen years may pay the same to her for the purpose of " defraying her dress and travelling expenses without seeing to " the application thereof and her receipt therefor shall be a " sufficient discharge to the trustee. And the trustee shall invest " the surplus income if any of such share in any investments " hereby authorized in augmentation of the capital of such share. "(iii) After the death of such daughter the trustees shall hold such " share and the future income thereof in trust for all or such one " or more exclusively of the others or other of the children or " remoter issue of such daughter in such shares if more than one " and in such manner in all respects as such daughter shall by " any deed or deeds revocable or irrevocable or by will or codicil " appoint. And in default of and subject to any such appointment in trust for all or any the children or child of such " daughter who being male attain the age of twenty-one years or " being female attain that age or marry and if more than one in " equal shares provided that no child of such daughter who or " whose issue shall take any part of the share of such daughter " under any appointment by virtue of any power herein contained " shall in default of appointment to the contrary be entitled to " any share of the unappointed part of the share of such " daughter without bringing the share or shares appointed to him

1954

Burton's Settlement Trusts, *In re.* Public Trustee *v.* Montefiore.

" or her or to his or her issue into hotchpot and accounting for " the same accordingly." Clause 4: " If the trusts hereinbefore " declared concerning either such daughter shall fail then subject " to the trusts powers and provisions herein declared and contained and to the powers by law vested in the trustees " concerning the same and to every or any exercise of such " respective powers such share shall go and accrue by way of " addition to the share of such other daughter and shall be " held upon the trusts and subject to the power and provisions " herein declared and contained concerning her original share or " as near thereto as circumstances will admit." Clause 5: " The " trustees may at any time or times raise any part or parts not " exceeding in the whole one moiety of the share of either such " daughter or of the expectant share of any child or remoter issue " of such daughter (but with her consent in writing during her " lifetime) in the trust fund and may pay or apply the same for " his or her advancement or benefit in such manner as the " trustees shall think fit."

The settlor's daughter Audrey died on August 31, 1927, a spinster. The settlor died on July 12, 1932. His daughter Ida died on September 25, 1952, a spinster, and on her death the question arose as to how the trust fund was distributable.

A summons was taken out by the Public Trustee (the present trustee of the settlement) to determine whether in the event which had happened of the death without issue of the two daughters of the settlor, the fund was held (a) on trust in equal moieties for the respective personal representatives of the two daughters; or (b) on trust (as to the entirety) for the personal representative of Ida Marion Burton, the later survivor of the said beneficiaries; or (c) on a resulting trust for the personal representative of the settlor, or (d) on or for some other and what trusts or interests.

E. I. Goulding for the plaintiff.

A. J. Belsham for the legal personal representatives of the two daughters of the settlor. On the true construction of this settlement the daughters must take if they have no children. They had no children and there was no ultimate gift over—a factor which must be taken into account: see *In re Marshall.*[1] See also the statement of the rule in *Hancock* v. *Watson* [2] by Lord Tomlin in *Attorney-General* v. *Lloyds Bank Ld.*[3] to the effect that, if there is an absolute gift to a legatee in the first instance and trusts are engrafted or imposed on that absolute gift, which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect, so far as the trusts have failed, to the exclusion of the residuary legatee or next-of-kin, as the case may be: see *In re Payne*,[4] and also *In re Norton*,[5] which support Lord Tomlin's statement.

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[1] [1928] Ch. 661.

[2] [1902] A.C. 14.

[3] [1935] A.C. 382, 394.

The effect of the provision is to give an absolute interest to the daughters, subject to the trusts. See also *In re Litt*[6] with reference to the question of accruer. The effect of the terms of the settlement is to give an absolute interest to the settlor's daughter Audrey and, as she died before her sister Ida, the accruer clause took effect and her share accrued to her sister. [Reference was also made to *In re Gatti's Voluntary Settlement Trusts*[7]; *In re Hatch*[8]; *In re Johnson's Settlement Trusts*[9] and *Rucker* v. *Scholefield*.[10]]

Ian Campbell for the legal personal representative of the settlor. To succeed, the daughters must establish a gift. It is a matter of construction whether there is an immediate gift, and in this case it is impossible to interpret the words as establishing such gift, as the settlor has not used any clear words of gift. He has directed certain appropriations. Clause 2 is strongly in favour of a decision against the daughters. There is a direction not to appropriate to a person, but merely to appropriate as a share. There are no words of gift in clause 2. The words may carry the matter down to a hypothetical appropriation and nothing further. If there is no gift there can be no vesting of the capital. There are no words indicating a gift of capital interest.

Clause 4 is an accruer clause but there is no gift to the surviving daughter. The case is distinguishable from *In re Litt*.[11] That case contained absolute gifts, and it was held that the accrued shares formed part of the estate of the last surviving child. Here, however, there is nothing in the settlement, as a whole, entitling the court to decide that there is an absolute gift, and *In re Litt*[11] is inapplicable to the circumstances of the present case.

[4] [1927] 2 Ch. 1.

[5] [1949] W.N. 23.

[6] [1946] Ch. 154; 62 T.L.R. 303; [1946] 1 All E.R. 314.

[7] (1936) 52 T.L.R. 674; [1936] 2 All E.R. 1489.

[8] [1948] Ch. 592; [1948] 2 All E.R. 288.

[9] [1943] Ch. 341; 59 T.L.R. 434; [1943] 2 All E.R. 499.

[10] (1862) 1 H. & M. 36.

[11] [1946] Ch. 154.

1954

BURTON'S SETTLEMENT TRUSTS, *In re.* PUBLIC TRUSTEE *v.* MONTEFIORE.

ROXBURGH J. This difficult case is a further instalment of the chapter relating to the rule in *Hancock* v. *Watson.*[1] The rule is familiar enough, and from the many places in which that rule is stated, I propose to adopt the statement by Lord Tomlin in *Attorney-General* v. *Lloyds Bank Ld.*[2]: "the respondents "contend, first, that the rule commonly known as the rule in "*Lassence* v. *Tierney* [3] approved and applied by your Lordships' "House in *Hancock* v. *Watson* [4] operates in the present case, "with the result that upon the true construction of the appoint-"ment there is an absolute initial gift to the three children of "the settlor in equal shares, and that the absolute initial gift of "each share is only cut down if and when and while there is in "existence some person qualified to take under the trusts of such "share declared in derogation of the absolute gift and to the "extent necessary to give effect to the rights of such person."

The difficulty in this case, as always, is to apply the rule; or, in other words, to determine whether there is what is called "an absolute initial gift" to the beneficiaries in question. First of all, of course, what the court looks for is not something which is in fact an absolute gift, because ex hypothesi it is not, but something that is in form an absolute gift. That is made clear by Lord Tomlin in a later passage in his speech. Moreover, the word "absolute" there, I think, merely means "complete" or "full," as distinct from a limited gift such as a gift of a life interest, or a gift durante viduitate.

The distinctions which have been drawn in some of the cases are very fine. This much at least is clear in the present case, that there is not in express terms any gift to the beneficiaries in the first instance. The question, and it is a difficult question, is whether there are in the context of the settlement sufficient indications to justify the court in construing certain words which are capable of more than one meaning in the sense of an initial gift.

The settlor, having expressed his desire of making some provision for the maintenance, education and benefit of his daughters Audrey and Ida, had transferred some investments to trustees. He directs the trustees to stand possessed of the investments and the investments for the time being representing the same (thereinafter called the "trust fund"), and of the annual income thereof upon trust to divide the trust fund or without actual division to treat the same as divided into two equal parts, and to appropriate one of such parts as the share of each of them the said two daughters of the settlor Audrey and Ida. Then the settlement proceeds: "The share of the trust fund of "each of the said two daughters of the settlor shall not vest "absolutely in such daughter but shall be retained" upon certain trusts. I need not read the trusts in full. There is a life interest for the daughter with a power of appointment amongst her issue, and trusts for issue in default of appointment.

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[1] [1902] A.C. 14.

[2] [1935] A.C. 382, 394.

[3] (1849) 1 Mac. & G. 551.

[4] [1902] A.C. 14

In the event which has happened, both the daughters have died without ever having been married. Accordingly, all the trusts failed except the trust for the daughters for life and for the surviving daughter for life. The latter arises under the accruer clause, which is as follows: "If the trusts hereinbefore declared "concerning the share of either such daughter shall fail then "subject to the trusts powers and provisions herein declared and "contained and to the power by law vested in the trustees "concerning the same and to every or any exercise of such "respective powers such share shall go and accrue by way of "addition to the share of such other daughter and shall be held "upon the trusts and subject to the powers and provisions herein "declared and contained concerning her original share or as near "thereto as circumstances will admit."

So what happened was that the two daughters Audrey and Ida, in the first instance, each had a life interest in what for the moment I will call without prejudice "their respective shares," and then, on the death of Audrey on August 31, 1927, Ida, under the operation of the accruer clause, had a life interest in the whole fund, and on her death unmarried on September 25, 1952, all the trusts declared by the settlement failed; and the question which I have in the first instance to decide is whether there is a resulting trust to the settlor.

There is another question which, on any view, I could not decide today. It so happens that, as a result of certain wills and dispositions (which I need not state), it does not matter whether or not, if there is no resulting trust, the whole fund goes to the estate of Audrey or to the estate of Ida. Therefore, counsel have not been instructed separately to argue that particular question, and I do not propose to decide it; but there is no doubt that I have to think of that matter in connexion with the construction of the settlement; indeed, this is only the second case in the voluminous reported literature on this theme in which an accruer clause has been relevant. The first, and I think it is expressly stated to be the first, is *In re Litt*,[5] a decision of the Court of Appeal.

In *In re Litt*[5] it was plain, and, indeed, I think the point was not argued in the Court of Appeal, that there was an initial gift, and that the rule in *Hancock* v. *Watson*[6] applied, and the argument was whether or not the rule applied de novo to the accruer clause so as to carry the whole fund to the surviving share to the exclusion of the original share. The court came to the conclusion that the rule did apply de novo or a second time. There was no doubt in that case about the first gift. The court did not have to consider what bearing the accruer clause might have on the construction of a doubtful initial creation of shares. That problem I must consider.

There is, to my mind, an important point at the outset of this debate. I am sure that nowhere in the books is there a direction to divide the trust fund or without actual division to treat the same as divided. It was said by Lord Greene M.R. in *In re Norton*,[7] that a trust to divide something between three people appeared to him to be a suitable direction for a beneficial division; but that could hardly be said of a trust to divide the same into three parts or two parts, still less of a trust to divide or without actual division to treat it as divided into two parts. It seems to me that such a direction points inescapably to an administrative direction to trustees, in contradistinction to the attempted creation of any beneficial interest; and it is in that context that the meaning of the words "to appropriate one of such parts as "the share of each of them the said two daughters" is to be found.

I am not unaware that there are cases in which a direction to appropriate to a person has been enough to create a beneficial interest in that person. Whether a direction to appropriate as the share of a person has ever been held to be enough, I do not know, but, at any rate, I do not think that any such direction has ever been considered in the setting in which I have it here; and, when it is plain that the first part of the direction is of an administrative character, I think that it is reasonable and proper to assume that the second part of the direction is of an administrative character as well. Therefore, I think that "to appropriate one of such "parts as the share of each of them the said two daughters" is merely a direction to the trustees of an administrative character and is not intended to create any beneficial interest.

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[5] [1946] Ch. 154.

[6] [1902] A.C. 14.

[7] [1949] W.N. 23.

The settlement proceeds: "The share of the trust fund of "each of the said two daughters of the settlor shall not vest "absolutely in such daughter but shall be retained. . . ." It is quite certain that those words are not in themselves construed as negativing the creation of a beneficial interest if there are words to justify its creation. There are many cases in which these words have occurred and yet the rule in *Hancock* v. *Watson* [8] has been held to apply; but it does not seem to me that they are sufficient to create any beneficial interest. Where a beneficial interest has already been created on the true construction of the will, they are treated as meaning that the gift shall vest but shall not vest absolutely, but where, as here, there is no gift in any of the other words, I think that they merely mean that what the daughters are to have is not anything that has hitherto appeared but the life interest which they are given under the following trusts; in other words, that the word "absolutely" in this will is used in contradistinction to the life interest expressed to be without power of anticipation. It is true, also, that the settlor in later passages in the settlement refers to the "shares" of his daughters. I cannot, however, but regard that as a compendious way of referring back to that which he has expressed much more fully in the initial direction which I have already read.

Then I come to the accruer clause. If there had been in this case a clear initial gift, as there was in *In re Litt*,[9] I should have been strongly tempted to hold that *Lassence* v. *Tierney* [10] would have to apply over again and that there was a gift in the accruer clause, notwithstanding the very strong differences unfavourable to the application of the rule which exist between the present case and *In re Litt*,[9] for this reason: the accruer clause contemplates the blending of the funds, and, therefore, there is a very strong presumption that the beneficial interests in the whole fund are thereafter to be the same for all purposes, not merely for the application of the declared trusts, because so far they plainly are the same for all purposes, but for the application of any principle of resulting trusts, which, of course, is a rule of law applied in the absence of a declared trust. It would be a very strange thing if the estate of Ida as the surviving daughter were entitled absolutely to her original share and not to the share

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[8] [1902] A.C. 14.

[9] [1946] Ch. 154.

[10] 1 Mac. & G. 551.

1954

BURTON'S SETTLEMENT TRUSTS, *In re.* PUBLIC TRUSTEE *v.* MONTEFIORE.

Roxburgh J.

which accrued, seeing that the two shares were blended in order to give effect to her life interest as the survivor of the two daughters; and yet I notice, first of all, that Lord Greene M.R. in *In re Litt*,[11] said that he thought that even on the words there it was a difficult case to decide whether the rule in *Lassence* v. *Tierney*[12] or *Hancock* v. *Watson*[13] applied; and when discussing his decision, he actually said this: "With "regard to the direction for accruer . . . the testator says 'such "'child's share and any additional share or shares in the trust "'fund or otherwise which may accrue or be added thereto by "'virtue of this present proviso and the income thereof shall "'go and accrue to such of my children as shall be living at the "'death of such child of mine.' Pausing there for a moment, "the language used appears to me to be perfectly apt to express "an absolute gift. The direction is not that the accruing share "is to accrue to the original share, but is to accrue to the then "living children." Here, on the contrary, it is "is to accrue "to the share of such other daughter"; not "to the other "daughter." In my view, it would be almost impossible to construe the accruer clause in this case as creating a de novo application of the rule in *Hancock* v. *Watson*.[14]

That being so, that, in my view, is an additional reason for thinking that the only words which could be said to create an initial gift were intended, as I have already suggested, as an administrative direction and not as creating beneficial interests, because, as I have already said, it would be very strange if there had to be a redivision by reason of different beneficial incidents of a fund which has already been properly blended in order to give effect to the life interest of the surviving daughter.

Therefore, with hesitation, I come to the conclusion that there is on the true construction of this settlement no initial gift to the daughters. The only gift to them is in the trusts declared in their favour, with the result that there is a resulting trust to the settlor, because the trusts have now all failed.

Declaration accordingly.

Solicitors: *Routh, Stacey & Castle, for Orford, Cunliffe, Greg & Co., Manchester; Stileman, Neate & Topping; Gregory, Rowcliffe & Co., for George Gatey & Son, Windermere.*

J. L. D.

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[11] [1946] Ch. 154, 158.

[12] 1 Mac. & G. 551.

[13] [1902] A.C. 14.

[14] Ibid.

In re MURRAY, DECD. MARTINS BANK LD. *v.* DILL AND ANOTHER.

C. A.

1954
July 28, 29, 30.

Evershed M.R., Jenkins and Hodson L.JJ.

[1954 M. No. 163.]

Will—Construction—Uncertainty — Condition subsequent — Name and arms clause—Direction to "assume the surname."
Name and Arms Clause—Validity.

By his will a testator settled an estate known as the Coles Park Estate on the first defendant for life, with remainders over. In 1953 the testator made a codicil to his will by which he substituted for clauses 8, 9 and 10 of his will the following provisions: "8. Provided always that every person who under the trusts hereinbefore "contained becomes entitled as tenant for life or in tail male . . . "to the possession . . . of the Coles Park Estate and also the "husband of any female becoming so entitled shall unless prevented "by death or accident assume the surname of Murray either alone "or in substitution of his or her usual surname (yet so that the "name of Murray shall be the last or usual name) and shall apply "for proper authority to bear and use my family arms. 9. In case "any person becoming so entitled or being a married woman her "husband shall refuse or neglect to assume the surname of Murray "and arms aforesaid or to make such application as aforesaid "within one year after he or she shall so become entitled or being "an infant . . ."; then followed certain divesting provisions. "10. It is my earnest wish and desire that every person becoming "entitled as tenant for life . . . to the possession . . . of the Coles "Park Estate or in the case of a married woman her husband shall "continue to use the surname of Murray as aforesaid and to bear "my family arms so long as they are entitled to the possession of "the Coles Park Estate." The testator died on August 11, 1953:—

Held that, on the true construction of the codicil, it was impossible for the court to see from the beginning precisely and distinctly on the happening of what event the preceding vested estate was to determine; that (1) in particular in the context of clause 8 there was doubt as to what degree of user of the surname was required by the obligation "to assume the surname of Murray," that (2) there was a real doubt as to the meaning of the phrase "assume the "surname of Murray either alone or in substitution of his or her "usual surname . . . ," and that (3) the obligation imposed by clause 8 did not correspond with the forfeiture provisions in clause 9 which resulted in confusion. Accordingly, the clause was void for uncertainty.

Principle laid down by Lord Cranworth in *Clavering* v. *Ellison* (1859) 7 H.L.C. 707, 723, and observations of Lord Simonds L.C. in *Bromley* v. *Tryon* [1952] A.C. 265, 273; [1951] 2 T.L.R. 1119; [1951] 2 All E.R. 1058, 1064, applied.

Decision of Upjohn J. reversed.

C. A.

1954

MURRAY, DECD., *In re.* MARTINS BANK LD. *v.* DILL.

APPEAL from Upjohn J.

The testator, John George Murray, by his will dated January 11, 1951, settled his Coles Park Estate in strict settlement on the first defendant Richard Patrick Gordon Dill (hereinafter called "Major Dill"). Clauses 8, 9 and 10 of the will contained certain provisions requiring the tenant for life of the Coles Park Estate and his successors in title to take and use the name and arms of "Murray," with provisions for forfeiture in the event of failure to do so.

By a codicil dated June 3, 1952, the testator revoked clauses 8, 9 and 10 of his will and directed that his will should be read as if it contained the following clauses in the place of those which he had thereby revoked: "8. Provided always that every person "who under the trusts hereinbefore contained becomes entitled "as tenant for life or in tail male or in tail by purchase to the "possession or to the receipt of the rents and profits of the Coles "Park Estate and also the husband of any female becoming so "entitled shall unless prevented by death or accident assume the "surname of Murray either alone or in substitution of his or her "usual surname (yet so that the name of Murray shall be the "last or usual name) and shall apply for proper authority to bear "and use my family arms. 9. In case any person becoming so "entitled or being a married woman her husband shall refuse or "neglect to assume the surname of Murray and arms aforesaid "or to make such application as aforesaid within one year after "he or she shall so become entitled or being an infant within "one year after he or she shall attain the age of twenty-one years "then and in every such case if the person who shall so refuse "or neglect as aforesaid shall be tenant for life of the Coles Park "Estate the interests of that person shall absolutely determine "and become void and the Coles Park Estate shall be held during "the residue of the life of the person whose interest for life so "determines upon trust from time to time during the residue "of the life of that person to pay the rents and profits of the "premises to or permit the premises to be received or enjoyed "by the person or persons who would for the time being be "entitled thereto under the trusts hereinbefore contained if that "person were deceased and if the person who shall so refuse or "neglect as aforesaid shall be tenant in tail male or in tail "general then the entailed interests of that person shall absolutely "determine and the premises hereby settled shall immediately "go to the person next in remainder upon the trusts hereinbefore "contained in the same manner as if the person whose entailed "interests are so made to determine were dead and there was a "general failure of issue inheritable to the interests which are "so made to determine. 10. It is my earnest wish and desire "that every person becoming entitled as tenant for life in tail "male or in tail by purchase to the possession or to the receipt "of the rents and profits of the Coles Park Estate or in the case "of a married woman her husband shall continue to use the "surname of Murray as aforesaid and to bear my family arms so "long as they are entitled to the possession of the Coles Park "Estate or to the receipt of the rents and profits thereof."

The testator died on August 11, 1953. By summons the executors of the will, Martins Bank Ld. and Donald John Dean, asked whether the provisions contained in the codicil for the assumption of the name and arms of Murray were binding on the first defendant, Major Dill. The second defendant, Joseph Lumley Murray, represented the persons beneficially entitled to the Coles Park Estate other than Major Dill.

Upjohn J. held that the provisions were binding.

Major Dill appealed.

R. W. Goff Q.C. and *G. D. Johnston* for Major Dill. The judge based his decision on his ability to construe clauses 8 and 9 of the codicil, which he did by remodelling these clauses. He did not consider what was the meaning of "assume the surname "of Murray." The time-honoured formula is "to take and use" a surname. The codicil imposes no obligation to use the surname. It is impossible to know what degree of user is required. An obligation to assume, without any obligation to use, a surname is too indefinite a conception to be enforced. These clauses read as a whole are on their true construction void for uncertainty. The language is garbled and cannot be construed as it stands; something must be read in or words deleted. These are penal clauses and should be strictly construed. It is only by doing some violence to the language that it is possible to place a definite meaning on clause 8. Clause 9 also is not clear and it is not consistent with clause 8.

If it is possible to put a clear meaning on the words used, the operation of these clauses is uncertain. It is not clear what steps must be taken before the surname can be said to be "assumed." The draftsman was frightened by the recent decisions on name and arms clauses and the new clause he has framed is no more

C. A.
1954

MURRAY, DECD., *In re.* MARTINS BANK LD. *v.* DILL.

certain in its operation than the old clauses which have been held to fail for uncertainty. Mere user of a surname is not equivalent to assumption of the name. The question is what length of user is required. Nor is it clear what kind of user is required, or whether it would be sufficient if the name were used for some purposes but not for others, as, for example, if Major Dill used the name of Dill for the purpose of his service in the army. The meaning of "usual" surname is also uncertain. These clauses are uncertain in their operation. After the judge had given his decision he was asked various questions as to the method of assumption of the name and the degree of user required. The difficulty in answering these questions shows plainly that these clauses are too uncertain to be enforceable. [Reference was made to Davidson's Precedents in Conveyancing, 3rd ed., vol. 3, Pt. II, p. 1141; *Clavering* v. *Ellison* [1]; *In re Viscount Exmouth* [2]; *Sifton* v. *Sifton* [3]; *Bromley* v. *Tryon*.[4]]

These clauses do not follow precedent but they are void for uncertainty for the same reasons as were held to render void the name and arms clauses considered in *In re Parrott* [5]; *In re Lewis' Will Trusts* [6]; *In re Bouverie, decd.*[7]; *In re Wood's Will Trusts* [8]; *In re Kersey*.[9] These clauses are void both for uncertainty of expression and for uncertainty of operation.

Michael Albery for Joseph Lumley Murray. The authorities deal with uncertainty of operation, not with uncertainty of construction. There is no difficulty as to the construction of these clauses apart from the word "usual." The court will supply words in a will which have obviously been omitted: see Theobald on Wills, 11th ed., p. 642. The fact that there are difficulties in the construction of these clauses is not a good ground for holding them to be void for uncertainty. Clause 9 is clear in its meaning. It should not be held to be bad because clause 8 presents difficulties. With regard to the meaning of "usual": it adds, in fact, nothing to the meaning of the clause and, in any event, its meaning is sufficiently clear: *Wynne* v. *Fletcher* [10]; *In re Drax*.[11] The word "assume" is a word much used by conveyancers. It is used alone in the name and arms clause in Prideaux's Precedents in Conveyancing (1904), 19th ed., vol. 2. In subsequent editions the clause was remodelled. Having regard to the observations of Lord Simonds L.C. in *Bromley* v. *Tryon*,[12] reliance is placed on such user. The fact that a beneficiary is not bound to retain the surname is no reason for holding the clause to be void. The trustees have been told the period within which the name must be assumed; it is one year. It is submitted that these clauses are valid. [Reference was made to *In re Edwards*[13]; *In re Llangattock*[14]; *In re Hinckes*[15]; *In re Croxon*[16] and *In re Berens*[17]; and to Jarman on Wills, 8th ed., p. 1532.]

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[1] (1859) 7 H.L.C. 707.

[2] (1883) 23 Ch.D. 158.

[3] [1938] A.C. 656; 54 T.L.R. 969; [1938] 3 All E.R. 435.

[4] [1952] A.C. 265; [1951] 2 T.L.R. 1119; [1951] 2 All E.R. 1058.

[5] [1946] Ch. 183; 62 T.L.R. 189; [1946] 1 All E.R. 321.

[6] [1951] 2 T.L.R. 1032; [1951] W.N. 591.

[7] [1952] Ch. 400; [1952] 1 T.L.R. 355; [1952] 1 All E.R. 408.

[8] [1952] Ch. 406; [1952] 1 T.L.R. 670; [1952] 1 All E.R. 740.

[9] [1952] W.N. 541.

[10] (1857) 24 Beav. 430.

[11] (1906) 94 L.T. 611; 22 T.L.R. 343.

If the court should hold these clauses in the codicil void for uncertainty, then the clauses in the will for which they were substituted would stand, the doctrine of dependent relative revocation applying. That question is not raised by the summons.

R. W. Goff Q.C. in reply. The court should not supply words in order to give certainty to a divesting provision which would otherwise be void for uncertainty. Whether or not the decisions in which names and arms clauses have been held void for uncertainty were correctly decided, these clauses are void, since both their construction and operation is uncertain.

EVERSHED M.R. The question which calls for determination concerns the validity of certain provisions in the first codicil of the testator's will purporting to cause a divesting of a vested estate upon failure to comply with conditions as to the adoption of the testator's name and arms. The relevant question is thus framed in the originating summons: "Whether upon the true "construction of the said will and codicils the provisions contained "in the said codicil dated June 3, 1952, in regard to the assump- "tion of the surname of Murray and the application for proper "authority to bear and use the family arms of the said John "George Murray are wholly or to some and what extent valid "and binding or void on the ground of uncertainty or otherwise."

By his will dated January 11, 1951, the testator strictly settled substantial property known as the Coles Park Estate. By his first codicil dated June 3, 1952, he substituted for clauses 8, 9 and 10 in the will (which I may briefly refer to as name and arms clauses and which appear to have followed well-known precedents) name and arms clauses of a somewhat different character. The testator's second codicil was dated October 4, 1952, and is immaterial. The testator died on August 11, 1953.

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[12] [1952] A.C. 265, 273.

[13] [1910] 1 Ch. 541; 26 T.L.R. 308.

[14] (1917) 33 T.L.R. 250.

[15] [1921] 1 Ch. 475; 37 T.L.R. 388.

[16] [1904] 1 Ch. 252.

[17] [1926] Ch. 596; 42 T.L.R. 267.

The will and codicils were proved on October 1, 1953, the plaintiffs in the action being the executors and trustees. The effect of the strict settlement of the estate was that the first life interest thereunder was taken by the first defendant, Richard Patrick Gordon Dill (hereafter referred to as Major Dill). In the event of the failure or defeasance of his estate various other interests arise, which are represented by the second defendant, Joseph Lumley Murray.

Before I read the relevant clauses in the first codicil, there are certain general observations which I should like to make. The first is this: I have read the summons and the only question (other than a question to which we have not been referred, for nothing turns on it for the purposes of this appeal) which was raised by it. Mr. Albery at the end of his argument indicated the possibility of an argument on behalf of the second defendant based on dependent relative revocation; that is to say, he would desire to contend that, if the clauses substituted by the first codicil for clauses 8, 9 and 10 in the will are held to be invalid, then the revocation of the clauses in the original will would be ineffective and the original clauses would be, as it were, resurrected. That question was not raised in the summons, and, if it is open to Mr. Albery, nothing in this judgment will affect it. Further, at the end of the judgment in the court below, according to the shorthand note taken at the time, certain questions were raised by counsel for the first defendant as to what he ought to do in order to comply with the terms of the relevant clauses. These questions were also not raised by the summons and I, for my part, can see no reason why the judge should have been required to answer them. The discussion as recorded, however, did show, as I read it, that the judge had thought the case one of real difficulty and that he felt substantial doubts, by no means alleviated by the discussion, about his answer.

The second general observation is of a different character. In the course of the argument reference was made to a number of modern decisions on name and arms clauses. These included *In re Parrott*,[1] *In re Lewis' Will Trusts* [2] and *In re Bouverie, decd.*,[3] all decisions of Vaisey J.; *In re Wood's Will Trusts*,[4] a decision of

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[1] [1946] Ch. 183; 62 T.L.R. 189; [1946] 1 All E.R. 321.

[2] [1951] 2 T.L.R. 1032; [1951] W.N. 591.

[3] [1952] Ch. 400; [1952] 1 T.L.R. 355; [1952] 1 All E.R. 408.

[4] [1952] Ch. 406; [1952] 1 T.L.R. 670; [1952] 1 All E.R. 740.

Wynn-Parry J., and finally *In re Kersey*,[5] a decision of Danckwerts J. We were indeed told that these cases, or some of them, may have been the reason why the testator made his first codicil, substituting in it for his original name and arms clauses those to be found in the first codicil. However that may be, the cases, especially the last one, raise some doubt whether even those name and arms clauses which follow substantially precedents of respectable antiquity would now be regarded as valid.

I confess that I would have liked to have taken time to consider the present case before delivering my judgment, not only out of respect to Upjohn J., but more particularly if it should be thought necessary or desirable for me to express any view on those modern cases. But the dates make it essential that the court should give its decision at once, for the time limit for compliance with the conditions in the codicil expires on August 11 next.

In the circumstances I have been able to reach my decision on the special (and they are very special) terms of the instrument we have to construe. Though I have reached a different conclusion from that which appealed to Upjohn J. and have, therefore, done so with no little hesitation, I am comforted by the fact that, as I read his judgment and the transcript of the note of the discussion which followed it, it seems to me that the judge felt real doubt in his own mind upon this matter. I wish, however, to make it plain that, basing my decision as I do upon the special terms of this first codicil, I express no opinion one way or the other on the validity of the recent decisions which I have briefly mentioned. I can understand the view that clauses of this character in the year 1954 are something of an anachronism. I can also understand the view, which found some expression in the note of Danckwerts J.'s judgment in *In re Kersey*,[5] that the emancipated status of a married woman today has a real bearing on the desirability, from the point of view of public policy, of clauses which might make her capacity to enjoy herself substantial proprietary interests dependent on the willingness of her husband to change his name. But Parliament has not legislated upon the subject, and many of these clauses are derived from precedents settled very many years ago by skilled and careful conveyancers.

In *Bromley* v. *Tryon*,[6] in the House of Lords, Lord Simonds L.C. in the course of his speech used these words: "If, indeed,

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[5] [1952] W.N. 541.

[6] [1952] A.C. 265, 275; [1951] 2 T.L.R. 1119, 1124; [1951] 2 All E.R. 1058, 1065.

"on a consideration of the clause, I came to the clear conclusion "that the words in question had no precise meaning, I should "be bound to give effect to my opinion. A long course of conveyancing practice cannot, I think, even where titles may be "founded on it, be given the same effect as a line of judicial "authority. But at the lowest I should hesitate long before I "concluded that words which had for nearly 100 years passed "unchallenged by conveyancers, men often profoundly learned "in the law of real property and apt to dwell on nice distinctions "of language, were after all incapable of sufficiently precise "definition." The decision in *Bromley* v. *Tryon* [6] related to a different but analogous kind of clause, namely, an elaborate shifting clause; and, in my judgment, the language which I have quoted is by no means inapplicable to some at any rate of the types of name and arms clauses not uncommonly met with in practice.

Having made clear, as I hope, this reservation, I return to the particular case before us. Before I read the clause I desire to adopt once more the language of Lord Simonds L.C. in *Bromley* v. *Tryon.*[6] In approaching the construction of the clause in that case the Lord Chancellor said [7]: "I come then to the point which "was not argued before Harman J., but was chiefly relied on in "the Court of Appeal and in this House, viz.: that the clause "is altogether void for uncertainty. It is a question which I "must approach with this familiar principle in the foreground of "my mind: that, where a vested estate is to be defeated by a "condition on a contingency that is to happen afterwards, that "condition must be such that the court can see from the beginning, precisely and distinctly, on the happening of what event "it was that the preceding vested estate was to determine."

The Lord Chancellor referred to, and indeed his own speech reflected closely, the language of Lord Cranworth in the year 1859 in *Clavering* v. *Ellison.*[8] Though *Clavering* v. *Ellison* [8] has been cited and applied in a number of modern cases (for example, in *Sifton* v. *Sifton* [9] and *Bromley* v. *Tryon* [10]), I find it unnecessary to add further citations from those cases.

Clavering v. *Ellison* [11] provides, as I think, the answer to one argument which Mr. Albery put forward, namely, that it is only necessary to look ex post facto, as it were, when forfeiture clauses are alleged to have operated, at what has occurred and then to ask: in fact, has the life tenant complied or not complied with the obligations laid upon him? I do not think that that is right. This being in the nature of a divesting clause, a condition subsequent, it is necessary, in the language used by Lord Cranworth in *Clavering* v. *Ellison*,[11] that the court should see from the beginning—that is to say, from the time when the first tenant for life entered into possession—precisely and distinctly on the happening of what event it was that his vested estate was liable to be determined.

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[6] [1952] A.C. 265, 275.
[7] Ibid. 273.
[8] (1859) 7 H.L.C. 707, 725.
[9] [1938] A.C. 656; 54 T.L.R. 969; [1938] 3 All E.R. 435.
[10] [1952] A.C. 265.
[11] 7 H.L.C. 707.

The material parts of the three clauses inserted in the will by the first codicil are as follows: Clause 8: "Provided always "that every person who under the trusts hereinbefore contained "becomes entitled as tenant for life or in tail male . . . to the "possession . . . of the Coles Park Estate and also the husband "of any female becoming so entitled shall unless prevented by "death or accident assume the surname of Murray either alone "or in substitution of his or her usual surname (yet so that the "name of Murray shall be the last or usual name) and shall "apply for proper authority to bear and use my family arms." Clause 9: "In case any person becoming so entitled or being a "married woman her husband shall refuse or neglect to assume "the surname of Murray and arms aforesaid or to make such "application as aforesaid within one year after he or she shall "so become entitled or being an infant . . .", etc., then follow the provisions for divesting. Clause 10: "It is my earnest wish "and desire that every person becoming entitled as tenant for "life . . . to the possession . . . of the Coles Park Estate or in "the case of a married woman her husband shall continue to use "the surname of Murray as aforesaid and to bear my family arms "so long as they are entitled to the possession of the Coles Park "Estate. . . ."

It appears from the cases that a distinction has to be drawn between what I will call uncertainty in expression on the one hand and uncertainty in operation on the other. Thus it may be that an instrument is drawn in language so obscure that the court is quite unable to discover from that language what was the intention of the testator or settlor. In another case the language itself may be quite unambiguous to the reader and seem therefore to show quite clearly the precise event contemplated, and yet, when the language is applied to the facts of the case, it then produces, in fact, a doubt or uncertainty how it operates. In some cases the distinction between uncertainty in expression and uncertainty in operation is much more clearly marked than in others. The present case appears, perhaps, to be one in which the distinction is not so clearly marked.

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[11] 7 H.L.C. 707.

Mr. Albery in the course of his argument said that it is the first duty of the court to construe the instrument, applying, so far as is proper in the case of a will, due liberality to the terms used, and, having done that, and not before, it is then for the court to see how in fact the instrument operates or is liable to operate. You are not, says Mr. Albery, to observe obscurities in expression, add them together without any real attempt at solving them, and then say that the whole document is too obscure to enable you to determine with sufficient precision how it will operate in practice. I am prepared to accept that argument as well-founded, but doing my best fairly to construe this instrument—and since this is a defeasance clause the construction must be rather strict than liberal—I am still left in three respects with such a doubt as to the operation of this clause as leads me to conclude that the test in *Clavering* v. *Ellison* [11] has not here been satisfied.

The first doubt arises as to the exact significance, in the particular context of the present case, of the word " assume," a point which, as appears from the shorthand note of the proceedings below, was not argued at the time before the judge, but which was raised afterwards in the course of the discussion. I observe first that clause 10 in this codicil negatives continuing user of the name or the arms as a matter of obligation. On the other hand, it is, I think, clear that the word " assume " in reference to a surname necessarily imports some degree of user. Is it possible here to say with the certainty and precision which is required in this case what user, short of continuous user, is postulated for the assumption of the name? Put more particularly, is it possible to say with sufficient precision and certainty whether the assumption of the surname and subsequent discontinuance within the year would, or would not, cause a forfeiture? It would obviously be possible within the year for a life tenant to take all necessary steps to assume the name of Murray, to use it substantially and in fact for an appreciable time, and then, still within the year, to discontinue it. Mr. Albery accepted the suggestion that such a procedure would involve compliance with the terms of the codicil. I must say that I find that difficult to accept. I find it difficult to suppose that this testator could by his language have so intended. At any rate, I am upon that matter left in real doubt. Had it not been for clause 10, I should have been strongly moved to the conclusion, based upon some, though slight, authority, that the word "assume" involved both the notions of taking and of user, but the conjunction of the sole word "assume" (and not "take and use") and the provisions of clause 10 seem to me to make this matter one of real substantial doubt.

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[11] 7 H.L.C. 707.

I come to the second matter of difficulty, which arises from the extremely unusual and difficult phrase "assume the surname of "Murray either alone or in substitution of . . ." According to Upjohn J., that conjunction of words was hardly sensible, and had he not felt able to read into the clause something which he thought had been omitted, I draw the inference that he would himself have felt unable to support the validity of the clause. He said: "It was rightly pointed out that in clause 8 there is "an obvious confusion. It is, of course, nonsense to lay down a "condition that the donee must 'assume the surname of Murray "'either alone or in substitution of his or her usual surname.' "That does not make sense. Still less does it make sense when "you look at the following words in brackets: '(yet so that the "'name of Murray shall be the last or usual name).' It seems "to me, however, quite clear that some words must have dropped "out, and I do not think there is any difficulty in supplying them. "The sentence may read 'shall assume the surname of Murray "'either alone or in addition to or in substitution for his or her "'usual surname,' or perhaps the same result is achieved if the "words 'in substitution of' be struck out and be replaced by "'or in addition to.' Whichever be adopted, I cannot feel any "doubt in my own mind that the testator was laying down quite "clearly two conditions which a donee, on coming into possession "of the estate, was to satisfy."

Of course, if, on the words as they stand and without guessing, a court is able to say that it is obvious that there has been a slip and it is obvious also what the slip is, it would no doubt be right to make the emendation. To take the example given by Mr. Albery: If one finds in an instrument a reference to lending money "with or with security," nobody, I think, could possibly doubt that the second "with" was a mistake, a slip in writing or transcribing, for "without." But I cannot myself feel satisfied in this case what the slip was or that it is legitimate to insert something in, or to alter, the words which the testator used. I agree also with Mr. Goff that the results are not necessarily the same according as you put in the words "or in addition to" or you strike out "in substitution of" and replace those words by "in addition to." Moreover, as a matter of principle, unless the case is clear beyond doubt, I am not satisfied that the court is justified in reading words into, or otherwise remodelling, the clause in order to assist a forfeiture. If I am so far right, then it seems to me there remains here again a real doubt as to what extent the name Murray might be made part of a surname, either as the last word in the surname or otherwise.

I think that the point is probably sufficiently clear, once it is accepted that the substitution or remodelling cannot be done, from the discussion in argument; but to make the point again, let it be supposed that Major Dill thought fit to add the word Murray to his name and to call himself "Major Dill Murray." Would that be a substitution of "Murray" for his usual name of "Dill," because, or not because, the word "Murray" is then his last name? Would it make any difference if Major Dill continued for some purposes (for example, the Army records) to call himself "Major Dill" as before? What, if it be his last name, would be the significance of the words "or usual"? Mr. Albery suggested that "last or usual" were merely synonymous, but of that again I am not by any means sure. Instances were again given. We all know of persons who may have professional names which might or might not be their "usual" names. I am thinking of authors or actors as obvious examples. Without therefore elaborating this point further, to my mind, rejecting as I do the temptation to remodel this clause, I am here faced with an absence of that precision which I think *Clavering* v. *Ellison* [11] requires.

I come to the third and last of my three difficulties, which arises out of the opening words of clause 9 when read in relation to the final words of clause 8, which are concerned with the assumption or bearing of arms. Clause 9 it will be remembered, so far as relevant, provides: "In case any person . . . shall refuse "or neglect to assume the surname of Murray and arms afore-"said or to make such application as aforesaid." Those words carry you back to the concluding words of clause 8, and it will be seen at once that they do not correspond; for the obligation at the end of clause 8 was to assume the name of Murray and "shall apply for the proper authority to bear and "use my family arms." It is clear that the words "to bear and

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[11] 7 H.L.C. 707.

" use " are governed by " shall apply," so that the only obligation in clause 8 is to apply to bear and use, whereas in clause 9 the forfeiture may arise through any failure to use as distinct from making application.

There again, the judge was able to solve the difficulty by a remodelling of the clause. Having noted the difficulty, he said this: " Putting it very shortly, I think the clause can be read: " ' If he shall refuse or neglect to assume the surname of Murray " ' and the arms of Murray (if he receives authority to bear them), " ' or (if he does not) if he refuses and neglects to make such " ' application as aforesaid.' " I am not again satisfied that it is legitimate to involve oneself in such a remodelling for the purpose of assisting a forfeiture. Let it be supposed that Major Dill, bearing his own arms, then makes application to bear the arms of Murray and he is told by the authority, whoever it might be, that certain conditions will have to be complied with by him; and let it be supposed that Major Dill then says that he is unwilling to comply with those conditions. Has he or has he not satisfied the obligation? He has made the application, but by continuing to use and bear his own arms he would, I presume, be held not to have borne or used the arms of Murray. It seems to me there is here a confusion, and again I am not prepared so to remodel this clause for the purpose of assisting a forfeiture.

These difficulties seem to me to produce the result that, once more, using the words quoted by Lord Simonds L.C.,[12] the court cannot here see from the beginning precisely and distinctly on the happening of what event it was that the preceding vested estate was to determine. For those reasons, and with diffidence and respect to the judge below, I have come to the conclusion that the answer to the question in the summons ought to be that this clause is void for uncertainty, and I would allow the appeal.

JENKINS L.J. For the reasons stated by my Lord, to which I cannot usefully add anything, I agree that this appeal should be allowed.

HODSON L.J. I also agree for the same reasons.

Appeal allowed.

Solicitors: *Oswald Hickson, Collier & Co.; Crossman, Block & Co.*

B. A. B.

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[12] [1952] A.C. 265, 273.

1954
June 17, 18, 23;
July 28.

Upjohn J.

In re BURTON'S SETTLEMENTS.
SCOTT AND OTHERS *v.* NATIONAL PROVINCIAL BANK LD. AND OTHERS.

[1952 B. No. 1369.]

Power of Appointment—Fraud on power—Benefit to non-object—Purpose — Settlement — Power of appointment among issue — Testamentary execution in favour of objects of power—Enjoyment of testator's residue conditional on settlement of appointed property by objects in favour of themselves and of non-objects.

Will—Construction—Uncertainty—Condition subsequent—Settlement to be executed—" Within such period as my trustees shall think reasonable." Will—Construction—Exclusion if condition unsatisfied—" Will to take effect as if she had not been my daughter "—Effect on exercise of power of appointment by will. Settlement—Voluntary—Spes successionis—Settlement required by condition in will—Settlement of spes successionis not required—Inclusion of spes successionis irrevocable—Settlement not voluntary.

A testator first married in 1901. Of the issue of that marriage two daughters attained 21. (One died in 1927 and one, Ida, in 1953 after the issue of this summons.) The first wife died in 1922. The testator married again in 1924, and of that marriage there were issue two daughters, who attained 21 and were now married and had issue.

A post-nuptial settlement made by the testator in 1915 conferred on him a power of appointment in favour of such of his issue by any wife as should be born in his lifetime and should attain the age of 21 or being female attain 21 or marry as he should by deed or will appoint, and in default of appointment in trust for all such children.

On the occasion of his second marriage, the testator executed a marriage settlement dated August 19, 1924 (and a settlement supplemental thereto dated November 4, 1924), by which certain trust funds were held on trust for him for life and after his death for his widow during her life with remainder to the issue of that marriage as the testator should during the joint lives of himself and his wife by deed or will appoint and in default of such appointment as the survivor of them should by deed or will appoint and in default of such appointment for the children of the marriage equally.

The testator, by his will, dated August 20, 1924, appointed the income of the 1915 settlement to his second wife so long as she remained a widow. He executed a codicil to his will, dated November 13, 1930, by clause 3 of which he exercised the power of appointment in the settlement of 1915, and appointed the property subject to that settlement to the children of the second marriage absolutely. By clause 8 of the codicil he disposed of his residuary estate after the death of his second wife in favour of the children of his second marriage but if they failed to attain 21 to the daughter of his first marriage.

By clause 11 of the codicil he imposed a condition that no daughter should be entitled to a share of his residuary estate unless she executed " a settlement of the share hereinbefore appointed to " her of the trust funds and property comprised in the post nuptial " settlement . . . and in the case of a daughter of my second mar- " riage also of her share in the trust funds and property comprised " in the said second marriage and supplementary settlements con- " taining the same trusts for the benefit of herself and her children " and issue and subject to the same powers and provisions mutatis " mutandis as are declared . . . in my said will and this codicil " thereto or either of them of and concerning her share in the trust " fund. . . . If any daughter of mine shall refuse or fail to comply " with such condition my will shall be construed and take effect as " if she had not been a daughter of mine."

The testator died on July 12, 1932. His widow had remarried in 1940 and was still living. By a settlement dated November 4, 1947, in purported compliance with clause 11 of the codicil one of the testator's daughters by his second marriage executed a settlement of her share in the settlements of 1915 and 1924.

The court on this summons was asked to determine, inter alia, whether the condition in clause 11 of the codicil was void or valid and effectual; and the effect of that clause having regard to the settlement made in 1947 by one of the testator's daughters by his second marriage:—

Held: (i) that the testator's concluding direction in clause 11 of the codicil, that if a daughter failed to execute a settlement his will should be construed as if she were not his daughter, did not operate to revoke the appointment in clause 3 of the codicil of the funds subject to the 1915 settlement, since the condition in clause 11 only attached to the testator's own residuary estate and not to the 1915 settlement. (See p. 93, *post.*)

(ii) That the mere fact that the appointor purported to attach a condition intended to compel the appointees to settle the appointed fund in favour of non-objects was not of itself sufficient to constitute a fraud on the power; since there was nothing to be found in more recent authorities which laid greater emphasis on the doctrine of fraud on a power than *Duke of Portland* v. *Topham (Lady)* ((1864) 11 H.L.C. 32), which required that the appointor should act " with an entire and single view to the real purpose and " object of the power, and not for . . . any bye or sinister object " ; and since " the real purpose and object " of the testator's appointments was to benefit the objects of the power, clause 11 did not constitute a fraud on the power ; and the condition in clause 11 which attached to the enjoyment of the testator's own property and not to the appointed funds, was not an excessive execution. The appointments made by the testator were therefore not fraudulent but valid and effectual and the condition in clause 11 was binding on the appointees. (See pp. 100–1.)

In re Simpson's Marriage Settlement [1952] Ch. 412; [1952] 1 T.L.R. 868; [1952] 1 All E.R. 963 not followed.

Duke of Portland v. *Topham (Lady)* (1864) 11 H.L.C. 32; *In re Holland* [1914] 2 Ch. 595 and *Roach* v. *Trood* (1876) 3 Ch.D. 429 applied.

Vatcher v. *Paull* [1915] A.C. 372; *Churchill* v. *Churchill* (1867) L.R. 5 Eq. 44 considered.

(iii) That the settlement made in 1947 by one of the testator's daughters was effectual to catch funds appointed to her in future under the 1924 settlement, although clause 11 of the codicil did not require her to settle such interest, since the 1947 settlement was not voluntary but made in consideration of obtaining enjoyment of the testator's residuary estate in accordance with the provisions of his codicil. (See pp. 102–4.)

In re Ellenborough [1903] 1 Ch. 697 and *In re Brooks' Settlement Trusts* [1939] Ch. 993; 55 T.L.R. 914; [1939] 3 All E.R. 920 distinguished.

Clause 11 of the codicil required the settlements to be executed "as regards a daughter of mine by my second marriage . . . within "six calendar months next after my decease if she shall be of full "age at my decease or otherwise within six calendar months next "after the date when she shall have attained her majority or within "such further period as my trustees shall think reasonable or as "regards my daughter Ida . . . within six calendar months next "after the failure of the issue of my second marriage or within such "further period as my trustees shall think reasonable."

Held, further, that the condition in clause 11 was not void for uncertainty, since the time within which it could be performed was readily determinable by the trustees or by the court. (See pp. 93–5.)

In re Coxen [1948] Ch. 747; [1948] 2 All E.R. 492 applied.

Adjourned summons.

The testator, Arthur Burton, was twice married, first in 1901, and of that marriage there was issue two daughters who attained 21, a third having died in infancy. The first was Audrey, who died in 1927, and the second Ida, who died in 1953, after the issue of this summons. The testator's first wife died in 1922 and he married again in 1924. There was issue of that marriage two daughters, both of whom attained 21, namely, the plaintiff Fay Lamdin, who had married twice, first to a Mr. Worsfold, of which marriage there was issue one child, the second defendant, Tony Worsfold, now some five years of age; and secondly to the fourth plaintiff, and of that marriage there had been issue one son, the defendant Miles Lamdin, now nearly two years old. The second daughter, the plaintiff Heather Scott, had been married once only, to the third plaintiff, and there had been issue of that marriage a daughter, the defendant Susan P. A. Scott, now nearly one year old. The testator's second wife, who was still living, remarried in 1940.

On the occasion of his first marriage the testator made a marriage settlement in the usual form in favour of his wife and issue of that marriage.

The testator executed a voluntary settlement dated April 28, 1915, which contained the power of appointment, on which arose the question in issue on this summons. This settlement provided that after the death of the testator, in the events which happened, the trustee (now the defendant, the National Provincial Bank Ld.) should stand possessed of the trust premises in trust for such of the issue of the testator by any wife as should be born in his lifetime and should attain the age of 21 or being female attain 21 or marry as he should by "deed (revocable or irrevocable) or "by will or codicil appoint and in default of and subject to any "such appointment in trust for all the children" of the testator (by any wife) as being sons attained the age of 21 years, or being daughters attained that age or married in equal shares.

In 1919 the testator settled further investments upon trusts in the events which have happened for the daughter Ida.

On the occasion of his second marriage in 1924 the testator entered into a marriage settlement dated August 19, 1924, and a settlement supplemental thereto dated November 4, 1924. The funds subject to those settlements (hereinafter referred to as "the 1924 settlements") were held on trust for the testator during his life, and after his death for his widow during her life, and after the death of the survivor of them for the issue of their marriage as the testator should during the joint lives of himself and his second wife appoint, and in default of and subject to such appointment, as the survivor of them should by deed or will appoint, and in default of and subject to any such appointment for the children of the said marriage who, being male, should attain 21, or being female attain 21 or marry, in equal shares. No appointment was made by the testator during his life under these settlements, and no appointment had yet been made by the widow who was still living and might conceivably make an appointment.

In 1931 the testator made a further settlement supplemental to the second marriage settlements on the second wife and children of the second marriage.

On the occasion of his second marriage the testator also made a will, dated August 20, 1924. He did not exercise any of the powers of appointment conferred upon him by the various settlements except to appoint the income of the 1915 settlement to the second wife so long as she remained his widow. By clause 6 (c), (d) and (e) of his will the testator gave his residuary estate, which he defined as "the trust fund," on trust to pay an annuity to the second wife during her life, and subject thereto he gave the trust fund in trust for all his children who being male should attain the age of 21 years, or being female should attain that age or marry, in equal shares. That included the children of his first marriage.

By clause 7 of his will he settled the share of daughters in the trust fund on the usual trusts, providing each daughter should have a life interest in her share with a power of appointment amongst issue after her death, and in default thereof on trust for all her children who being male should attain the age of 21, or being female should attain that age or marry, in equal shares.

On November 13, 1930, the testator executed a codicil, which, among other things, exercised the power of appointment under the 1915 settlement which it was alleged constituted a fraud upon that power.

By clause 1 of the codicil the testator exercised the power of appointment contained in the first marriage settlement by directing the trustees thereof to stand possessed of the trust property upon trust for his daughter Ida absolutely. By clause 2 the testator recited that by virtue of the 1919 settlement certain trust funds were settled in trust for Ida and her issue, and that by virtue of the first marriage settlement and the appointment in clause 1 of the codicil and of the settlement of 1919, his daughter Ida was adequately provided for. In clause 3 the testator referred to the 1915 settlement (calling it the post-nuptial settlement), and, in particular, to his testamentary power of appointment in favour of his issue by any wife, and he recited that he had issue of his second marriage two children, Fay and Heather, and might possibly have further issue; and then, after referring to the fact that he had exercised his power of appointment over income to his widow for life by his will, he directed that the trustees of the 1915 settlement should, after the death or remarriage of his wife, stand possessed of the trust funds and property subject thereto, and the future income thereof in trust for all or any the children or child of the second marriage who should be living at his death and being male should attain the age of 21 years, or being female attain that age or marry, with a gift over in favour of Ida, which, in the events which happened could not take place. In clause 8 of the codicil the testator disposed of his residuary estate, and he revoked subclause (d) of clause 6 of his will, and in substitution he directed the trustees to pay the income of the trust fund (his residuary estate) to his wife during her life so long as she should remain his widow, and after her remarriage to pay one moiety of the income to her during the remainder of her life without power of anticipation; and subject thereto he directed that his trustees should stand possessed of the capital and future income thereof in favour of his children or child of his second marriage who being male should attain 21, or being female should attain that age or marry, in equal shares; but he directed that the share of a daughter should be retained by his trustees and held by them upon the trusts declared in clause 7 of the will.

Clause 11 of the codicil (which was the material clause on this summons) provided: "No daughter of mine shall be entitled to "any share of the trust fund except subject as aforesaid and "subject to this express condition namely as regards a daughter "of mine by my second marriage that she shall within six "calendar months next after my decease if she shall be of full "age at my decease or otherwise within six calendar months "next after the date when she shall have attained her majority or "within such further period as my trustees shall think reasonable "or as regards my daughter Ida Marian Burton within six "calendar months next after the failure of the issue of my second "marriage or within such further period as my trustees shall "think reasonable execute a settlement of the share hereinbefore "appointed to her of the trust funds and property comprised in "the post-nuptial settlement and in the case of my daughter Ida "Marian Burton also of the trust funds and property comprised "in my said first marriage settlement of the eighth day of "November One thousand nine hundred and one and in the case "of a daughter of my second marriage also of her share in the "trust funds and property comprised in the said second marriage "and supplementary settlements containing the same trusts for "the benefit of herself and her children and issue and subject "to the same powers and provisions mutatis mutandis as are "declared and contained in my said will and this codicil thereto "or either of them of and concerning her share in the trust fund "the persons to be appointed trustees of any such settlement to "be approved of by my trustees and the cost of preparing "executing and stamping the same to be paid out of my estate "as part of my testamentary expenses: provided always that if "any such daughter shall execute a settlement of her share in "the said post-nuptial settlement funds and of her share (if any) "in the said first marriage settlement funds and in the said "second marriage and supplementary settlement funds with my "approval during my lifetime such settlement shall be deemed to "be a compliance with the said condition. If any daughter of "mine shall refuse or fail to comply with such conditions my will "shall be construed and take effect as if she had not been a "daughter of mine."

The testator died on July 12, 1932, and his will and codicil were duly proved on October 3, 1932.

By a settlement dated December 30, 1947, Mrs. Lamdin, in purported compliance with the condition in clause 11 of the codicil, executed a settlement of her interests under the post-nuptial settlement of 1915 and the second marriage settlements of 1924. The relevant terms of the 1947 settlement are set out in the judgment of Upjohn J. on that question.

The questions on the summons relevant to this report were: (1) Whether the testator in exercising the special power of appointment conferred on him by the settlement of 1915 committed a fraud on that power, and (1A) if not, whether the conditions which he imposed on the appointees by the codicil of 1930 were valid and effectual or void for uncertainty? (2) If clause 11 were valid and effectual what would be its effect in the event of an appointment by the testator's widow under the power of appointment conferred by the 1924 settlement, and so far as Mrs. Lamdin was concerned, having regard to the settlement made by her in 1947, and whether the settlement of 1947 effectively settled any share which might be appointed to Mrs. Lamdin under the 1924 settlements, notwithstanding that the said conditions did not require her to settle such share.

Questions 1 and 1A were argued first.

G. A. Rink for the plaintiffs. The interests of the plaintiffs are not identical. The appointment is valid but the condition attached to it is void for uncertainty. On question 1, it is conceded that, even if the condition be void for uncertainty, the court is entitled to consider it so far as it may throw light on the intentions of the appointor. The appointment is not void merely because it is made in the belief and hope that the appointee will deal with the fund in favour of non-objects. Here there is no compulsion on the daughters to settle their appointed shares; the gift over does not even purport to affect those shares if they failed to comply with the condition.

The testator's primary intention to benefit his daughters (as opposed to their issue) appears from the facts that: (a) he did not require sons to settle their interests; (b) at the date of the will it was still customary to settle interests given on daughters and it was considered to be for their benefit to do so; and (c) the testator did not require Ida to settle interests appointed to her under the 1901 and other settlements, save in the very unlikely event of her receiving a share of residue as a result of the failure of all the issue of the second marriage.

The main hurdle facing the plaintiffs is *In re Simpson's Marriage Settlement*,[1] which is, however, distinguishable—mainly on the ground that in that case all the legatees were named and each of them was required to settle his share of the appointed fund immediately. Moreover, *In re Simpson*,[1] where many of the relevant authorities were not cited, was wrongly decided: in that case Vaisey J. declined to follow a dictum in *In re Neave*,[2] on which reliance is placed here. That dictum came at the end of a long line of cases dealing with excessive execution: in all those cases an appointment was held good notwithstanding that it contained a condition in favour of non-objects. In *In re Neave*[2] and a number of the earlier cases the question of fraud on the power was not raised: it was merely held that the appointment was good and that the condition (which was a condition relating to the appointed fund itself) was bad: see *Alexander* v. *Alexander*[3] and *Sadler* v. *Pratt*.[4] *Churchill* v. *Churchill*[5] is an even stronger case, since there the testator himself purported to settle the appointed fund, by means of a *Lassence* v. *Tierney*[6] clause, in favour of non-objects as well as objects, and it was held that the absolute appointment was valid although the purported settlement was void. The question of fraud on the power was not raised in *Churchill* v. *Churchill*,[7] but it was the principal point in *Roach* v. *Trood*,[8] where *Churchill* v. *Churchill*[9] was approved, and it was said that the fact that it appeared from the instrument or from extrinsic evidence that some persons not objects of the power were to take an interest in the appointed fund was not of itself sufficient to invalidate the appointment.

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[1] [1952] Ch. 412; [1952] 1 T.L.R. 868; [1952] 1 All E.R. 963.
[2] [1938] Ch. 793; 54 T.L.R. 921; [1938] 3 All E.R. 220.
[3] (1755) 2 Ves.Sen. 640.
[4] (1833) 5 Sim. 632.
[5] (1867) L.R. 5 Eq. 44.
[6] (1849) 1 Mac. & G. 551.
[7] L.R. 5 Eq. 44.
[8] (1876) 3 Ch.D. 429, 444.
[9] L.R. 5 Eq. 44.

In *In re Holland* [10] Sargant J. showed how the cases on excessive execution ought to be reconciled with the cases on fraud on powers. He said that where there was a genuine appointment to an object of the power, coupled with an attempt to impose on the appointment conditions or trusts in favour of persons who were not objects, the appointment was good, while if there was no genuine appointment to an object of the power, but the appointment to that object was made for purposes foreign to the power, then the whole appointment failed. Nothing in *Vatcher* v. *Paull* [11] affected the weight of *In re Holland*.[12] Moreover, Lord Parker in *Vatcher* v. *Paull* [13] referred twice, without disapproval, to *Stroud* v. *Norman*,[14] where a condition stricter than that in clause 11 was held not to invalidate an otherwise unobjectionable appointment. The latest case where an appointment was held to be a fraud on a power was *In re Dick*,[15] where the appointor had intended to benefit non-objects. [Farwell on Powers, 3rd ed., pp. 343, 346, was also referred to.]

Vaisey J. was wrong in saying, in *In re Simpson's Marriage Settlement*,[16] that nowadays much greater emphasis is laid on the doctrine of fraud on the power than formerly. That doctrine has never been more strongly stated than in the House of Lords in *Duke of Portland* v. *Topham (Lady)*.[17]

It cannot be argued on question 1A that the condition was void as being a condition in favour of non-objects engrafted on a power. In the above authorities as to excessive execution the void gift over was a gift over of the appointed fund itself, in the event of the failure of the appointee to comply with the condition. In the present case, non-compliance with the condition would leave the appointed interest unaffected: the gift over relates only to residue, with which the testator was entitled to deal as he thought fit. This distinction is firmly established against the plaintiffs here by *King* v. *King* [18] and *In re Neave*.[19]

However, the condition is void as not being so certain as to comply with the strict requirement of certainty where a condition

[10] [1914] 2 Ch. 595.

[11] [1915] A.C. 372.

[12] [1914] 2 Ch. 595.

[13] [1915] A.C. 372.

[14] (1853) Kay 313.

[15] [1953] Ch. 343; [1953] 2 W.L.R. 477; [1953] 1 All E.R. 559.

[16] [1952] Ch. 412.

[17] (1864) 11 H.L.C. 32.

[18] (1864) 15 Ir.Ch.R. 479.

[19] [1938] Ch. 793.

subsequent is concerned. The words relied on in this connexion are: "or for such further period as the trustees shall think "reasonable." If the words had been "such further period as "the trustees shall allow," this point could not arise, but reasonableness is an insufficiently certain concept for the purposes of a condition subsequent. [Reference was made to *In re Coxen,*[20] *In re Gape,*[21] *In re Wilson's Will Trusts,*[22] *In re Bouverie,*[23] *In re Wood's Will Trust*[24] and *Sifton* v. *Sifton.*[25]] If the concept on which the condition subsequent is to take effect is too uncertain, it cannot be made certain by referring it to the opinion of the trustees: *In re Allen*[26]; *In re Jones.*[27]

Nigel Warren for the trustee, the National Provincial Bank.

Michael Browne, for the plaintiffs' infant children, supported the argument for the plaintiffs on question 1 that clause 11 did not constitute a fraud on a power. Clause 11 cannot affect the appointed property because it is an entirely separate clause from that containing the appointment which is read back into the settlement. The condition only operates after the appointment takes effect. It is a more natural construction to say that it only affects residue and not the appointment which has already taken effect.

On the question of fraud on the power, the appointment being in favour of the class must stand or fall as a whole. *In re Simpson's Marriage Settlement*[28] is distinguishable from this case.

Question 1A. The condition in clause 11 is not void, because it can be said at any given time whether a daughter has or has not executed a settlement. The testator has sufficiently defined what he means by reasonable: *In re Wilson's Will Trusts.*[29] The testator has given the trustees sufficient data on which to form an opinion what is to be considered a reasonable period. If there is any uncertainty it is not in the condition itself but in the time at which it is to take effect. *In re Jones*[30] is distinguishable.

A. J. Belsham for the personal representatives of the testator's daughters by his first marriage, Audrey and Ida. On the construction of the will and codicil as a whole clause 11 constitutes a fraud on the power in the 1915 settlement. The only evidence of the testator's intention is the internal evidence of the codicil itself; that shows that the testator intended the appointment to be for the benefit both of his children (who were objects of the power) and their issue (who were not objects of the power).

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[20] [1948] 1 Ch. 747; [1948] 2 All E.R. 492.

[21] [1952] Ch. 743; [1952] 2 T.L.R. 477; [1952] 2 All E.R. 579.

[22] [1950] W.N. 507; [1950] 2 All E.R. 955.

[23] [1952] Ch. 400; [1952] 1 T.L.R. 355; [1952] 1 All E.R. 408.

[24] [1952] Ch. 406; [1952] 1 T.L.R. 670; [1952] 1 All E.R. 740.

[25] [1938] A.C. 656; 54 T.L.R. 969; [1938] 3 All E.R. 435.

[26] [1953] Ch. 810; [1953] 3 W.L.R. 637; [1953] 2 All E.R. 898.

[27] [1953] Ch. 125; [1953] 1 All E.R. 357.

[28] [1952] Ch. 412.

[29] [1950] W.N. 507.

[30] [1953] Ch. 125.

An intention to benefit non-objects either with or without proper objects will constitute a fraud on a power: see *In re Simpson's Marriage Settlement.*[31] That case was decided on the right principles and should be followed, although it is not sought to support the dictum in that case that much greater emphasis is to be laid nowadays on the doctrine of fraud on a power. It is not necessary to adopt that reasoning; it is sufficient that this appointment fails to fulfil the requirement laid down in *Duke of Portland* v. *Topham* (*Lady*),[32] that the appointor should act "with an "entire and single view to the real purpose and object of the "power, and not for . . . any bye or sinister object." (See also *Vatcher* v. *Paull.*[33]) It is therefore a fraud on the power.

The authorities cited here and not cited to Vaisey J. in *In re Simpson's Marriage Settlement*[34] relate in the main to excessive execution, where the part of the appointment which is excessive can be disregarded. In *In re Holland*[35] Sargant J. decided the matter as one of fact, and treated as a relevant fact the relatively small burden cast on the appointee as compared with the value of the interest appointed.

The question is whether the ulterior purpose disclosed can be severed, leaving the appointment to objects to stand, or whether there is such an improper purpose as to constitute a fraud and vitiate the appointment altogether. The dividing line between the two types of cases is a narrow one in the absence of extrinsic evidence of the appointor's intention. In this case the penal nature of clause 11 is relied on; it passes the bounds of moral suasion and it is more than the expression of a hope: *In re Crawshay.*[36] The testator expressed a hope that the children would execute a settlement in his lifetime—they were then one or two years old—but in case they failed to do so he would make them execute one under penalty of forfeiture. A penal clause of this kind throws light on the intention in making the appointment and cannot be separated from it, and tends to show that the

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[31] [1952] Ch. 412.
[32] 11 H.L.C. 32.
[33] [1915] A.C. 372.
[34] [1952] Ch. 412.
[35] [1914] 2 Ch. 595.
[36] [1948] Ch. 123.

1954

BURTON'S SETTLEMENTS, *In re.* SCOTT *v.* NATIONAL PROVINCIAL BANK LD.

appointment is fraudulent as having been made for a purpose foreign to the power: see *In re Cohen* [37]; *In re Perkins* [38]; Farwell on Powers, 3rd ed., pp. 346, 480, 489.

Further, as a matter of construction the forfeiture provisions of clause 11 of the codicil extend not only to the share a daughter would take under the will, but also to the share appointed under the 1915 settlement. The last part of clause 11 must mean his testamentary instruments and not his will to the exclusion of the codicil, since the daughters take their interests by the joint effect of the will and codicil. In other words, non-compliance with clause 11 would take away a daughter's appointed share as well as her interest in residue.

Browne's argument on question 1A, that the condition is void for uncertainty, is adopted.

Cur. adv. vult.

July 28. UPJOHN J., reading his judgment, having stated the facts as above set out: The principal question which I have to consider is whether, looking at the will and codicil as a whole, and having regard especially to clause 11, the appointment contained in the testator's codicil constituted a fraud on the power contained in the 1915 settlement; but it will be convenient first to notice two subsidiary points which have been argued before me.

The first of these subsidiary points is whether the concluding direction in clause 11 that, in the case of a daughter refusing to comply with the condition, his will should be construed and take effect as if she had not been a daughter, operates to revoke the appointment contained in clause 3 of the codicil.

In my judgment, clause 11 cannot be so construed. As appears from the opening words of that clause and from its place in the codicil, clause 11 is only dealing with the trust fund, that is, the testator's residue, and what the clause is saying, in effect, is that, the appointment in clause 3 having taken effect, then, if the daughter does not settle the share so appointed within the time limited thereafter, she is cut out of her interest in the trust fund. I see nothing to render the appointment in clause 3 itself nugatory ex post facto if she fails to settle the property thereby appointed.

The next subsidiary point is whether clause 11 is void for uncertainty. The only ground upon which it is suggested that

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[37] [1911] 1 Ch. 37.

[38] [1893] 1 Ch. 283.

1954

BURTON'S SETTLEMENTS, *In re.* SCOTT *v.* NATIONAL PROVINCIAL BANK LD.

Upjohn J.

the clause is so void is that the time limit, namely (in the events which have happened) six months after each daughter of the second marriage became 21, or within such further period as the trustees should think reasonable, renders the clause void for uncertainty.

Clause 11 constitutes a condition subsequent. In such a case it can be of no validity unless the court and the parties concerned can see from the beginning precisely and distinctly upon the happening of what event it is that the preceding vested estate is to determine: see *Sifton* v. *Sifton*[1] and *In re Gape.*[2] So far as this court is concerned, however, the test to be applied is an objective one to be determined by the court: see *In re Wilson's Will Trusts*[3] and *In re Wood's Will Trust.*[4]

Mr. Rink has submitted that to ascertain what is a reasonable period is a difficult matter of degree, and is too uncertain in its operation to give the requisite definition to a condition subsequent. Many people, he said, might take a different view as to what in any given circumstances might be a reasonable extension of time. He referred me to a number of authorities which show that in some cases the language which the testator has employed makes the event upon which the condition is to take effect incapable from the start of accurate formulation; for example, to reside in Canada: see *Sifton* v. *Sifton*,[5] to disuse a surname: see *In re Bouverie*,[6] or to do something so vague as to have a social or other relationship with a certain named person: see *In re Jones*[7]; and in such cases the condition is void; but there are other cases where the language employed embodies a concept of sufficient certainty, though there may be difficulty in ascertaining in fact whether the condition has occurred. In such cases the condition is not necessarily void: see *In re Gape.*[8] Morris L.J. in that case[9] cited with approval the following passage from *In re Coxen*,[10] where Jenkins J. said[11]: "There is, therefore, nothing "in *Sifton* v. *Sifton*[12] which precludes me from holding the "condition here in question to be a valid condition, provided

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[1] [1938] A.C. 656, 675; 54 T.L.R. 969; [1938] 3 All E.R. 435.

[2] [1952] Ch. 743, 747; [1952] 2 T.L.R. 477; [1952] 2 All E.R. 579.

[3] [1950] W.N. 507; [1950] 2 All E.R. 955, 964.

[4] [1952] Ch. 406; [1952] 1 T.L.R. 670; [1952] 1 All E.R. 740.

[5] [1938] A.C. 656.

[6] [1952] Ch. 400; [1952] 1 T.L.R. 355; [1952] 1 All E.R. 408.

[7] [1953] Ch. 125; [1953] 1 All E.R. 357.

[8] [1952] Ch. 743.

[9] Ibid. 750.

[10] [1948] Ch. 747; [1948] 2 All E.R. 492.

[11] [1948] Ch. 760.

[12] [1938] A.C. 656.

"I am able to attach a sufficiently definite meaning to it in the "context afforded by the codicil, and (as shown by *In re* "*Wilkinson*[13] and *In re Talbot-Ponsonby's Estate*[14]) in deciding "whether I am able to do so or not I must keep in mind the "distinction between uncertainty as to the events prescribed by "the testator as those in which the condition is to operate (which "is generally speaking fatal to the validity of such a condition) "and difficulty in ascertaining whether those events (sufficiently "prescribed by the testator as a matter of definition) have "happened or not, which is not necessarily fatal to such validity."

In my judgment the present case falls clearly within the latter class. The fact that the decision is given to the trustees cannot give certainty to a clause which is otherwise uncertain, see *In re Jones*[15]; but the concept that a person is to have six months from attaining a certain age or a reasonable time thereafter to do a particular act seems to me sufficiently certain for the doctrine in question. An obligation to do something within a reasonable time is one of the most familiar concepts in our jurisprudence, and it cannot possibly now be suggested that such an obligation is void for uncertainty. The time must be reasonable having regard to what the appointee has to do and to all the surrounding circumstances of the case. That is known from the moment that the testamentary appointment is made effective by the death of the testator, and I cannot see that there is any uncertainty about it. It may be that different minds may come to a different conclusion as to what, when the condition comes into operation possibly (as in this case) years later, would be a reasonable extension of time; but that is readily determined by the court or by the trustees where (as here) that matter is expressly confided to their discretion. Accordingly, in my judgment, this point fails.

I turn, then, to the main point raised by question 1 of the summons, namely, whether the appointment constitutes a fraud on the power.

In considering this matter, the general rule which should guide the court is to be found in Lord Parker's judgment in the Privy Council case of *Vatcher* v. *Paull*,[16] which was cited by Evershed M.R. in *In re Dick*.[17] In order to constitute a fraud on the power, Lord Parker said[18]: "It is enough that the appointor's

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[13] [1926] Ch. 842.

[14] 54 T.L.R. 33; [1937] 4 All E.R. 309.

[15] [1953] Ch. 125.

[16] [1915] A.C. 372, 378.

[17] [1953] Ch. 343; [1953] 1 All E.R. 559.

[18] [1953] Ch. 360.

"purpose and intention is to secure a benefit for himself or some "other person not an object of the power." In this case the appointor's purpose and intention are to be ascertained solely by reference to the contents of his will and codicil; no other evidence as to his intention is available.

The general scheme of the testator's will is perfectly simple. He makes out and out appointments to his daughter Ida under the first marriage settlement and to the children of the second marriage under the 1915 settlement. No one, I think, can doubt that those appointments were intended to give real benefits to his children respectively. The testator then gives his own residue to the children of the second marriage, and if none of them attained 21 to Ida, and he is careful to settle the daughters' shares of residue. He then provides that the daughters of the second marriage will forfeit their interests in residue unless they settle the shares appointed to them under the 1915 settlement. He also provides that if, but only if, Ida becomes entitled to the 1915 settled funds and to residue (in fact she cannot) then she also is to settle her appointed interest if she desires to enjoy her interest in residue.

The obvious intention of the testator in making that provision was to try to secure, if he could, that his daughters would settle the shares appointed to them, and that, of course, would benefit non-objects of the power, namely, the issue of daughters none of whom were born in his lifetime.

Is that sufficient to constitute a fraud on the power as defined by Lord Parker? The matter is not free from authority. In the Irish case of *King* v. *King*,[19] the testatrix appointed certain marriage settlement funds to her three sons and also bequeathed to them certain legacies, and she directed that the funds so appointed to the sons and also the legacies should be settled on the three children for life with remainders to their issue who were non-objects of the power, and if such settlements were not made the legacies were to fall into residue. It was held that the condition was valid, although it does not seem to have been argued that the imposition of such a condition constituted a fraud on the power. Nevertheless, as pointed out by Vaisey J. in *In re Simpson's Marriage Settlement*,[20] it is an express decision in favour of the view that the testator's appointment was valid and not vitiated by fraud. The same view was expressed by

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[19] (1864) 15 Ir.Ch.R. 479.

[20] [1952] Ch. 412; [1952] 1 T.L.R. 868; [1952] 1 All E.R. 963.

Farwell J., obiter, in *In re Neave.*[21] As the relevant passage in the judgment of Farwell J. is fully set out in *In re Simpson,*[22] I do not propose to repeat it here. Both those authorities were considered by Vaisey J. in *In re Simpson's Marriage Settlement* [22] and, after referring to *In re Crawshay,*[23] he came to the conclusion that a much greater emphasis is today laid on the doctrine of fraud on the power than formerly, and he held that a condition annexed to the enjoyment of residue in substance not unlike the present did constitute a fraud on the power. He said this [24]: " In the present case it seems to me that the " exercise of the power under this marriage settlement was made " for the purpose of furthering an object which the testator had " in view and was not confined to benefiting the appointees " themselves. I think he was determined that, so far as he " could, he would tie up the property with his own property and " have it dealt with as if it were his own property."

Mr. Rink has referred me to a number of earlier authorities which were not, according to the report, cited to Vaisey J., and which he submits establish this—that the mere imposition of a condition intended to benefit non-objects of the power has never by itself been held to vitiate the appointment as being fraudulent, but the condition where it is attached not to the testator's own property, but to the appointed fund itself, is merely rejected as being an excessive execution of the power—and, he submits that, had those authorities been brought to the attention of Vaisey J., his decision would have been the other way.

Mr. Rink's review of the authorities starts with the example given by Clarke M.R. in *Alexander* v. *Alexander,*[25] and he follows that by a reference to *Sadler* v. *Pratt.*[26] These authorities are sufficiently set out in Farwell on Powers (3rd ed., p. 343): " ' Suppose a power to a man to appoint £1,000 amongst his " ' children; if the father gives the £1,000 to his children and " ' annexes a condition that they shall release a debt owing to " ' them or pay the money over, the appointment of the £1,000 " ' would be absolute, and the condition would be only void.' " To the like effect is *Sadler* v. *Pratt,*[26] where " A lady having four " children by her first husband, and three by her second, and " having power to appoint a fund amongst the former only,

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[21] [1938] Ch. 793; 54 T.L.R. 921; [1938] 3 All E.R. 220.

[22] [1952] Ch. 412.

[23] [1948] Ch. 123; 64 T.L.R. 67; [1948] 1 All E.R. 107.

[24] [1952] Ch. 417.

[25] (1755) 2 Ves.Sen. 640.

[26] (1833) 5 Sim. 632.

"appointed amongst *all* her children equally, and declared that, "if her children by her first husband should refuse to share the "fund with her other children, the whole fund should go to her "youngest child by her first husband. Held that the appointment was not wholly void, but that the first class of children "took, each, one-seventh of the fund under it, and the other "shares went to them, as in default of appointment."

The next case is *Churchill* v. *Churchill*,[27] where a testator made appointments in favour of his daughters and then purported to settle the appointed shares in favour of the daughters for life and then upon their children who were not objects of the power. It was held that the original appointment was good and the purported settlement was bad. The case is of some interest because it is clear that Lord Romilly M.R., in giving judgment, thought that there would be no objection to annexing a condition as in the case before me, although, of course, his observations upon that point were obiter. Having considered two earlier cases, one of which appeared to have turned mainly on the fact that the appointment by the testator was introduced by the words [28] " 'so " 'far as I lawfully or equitably may or can,' " he said [28]: "if the "testator knew that it was doubtful why did he not couple the "gift of the residue with a condition which would have compelled "the legatee to give effect to his wishes?"

In these earlier cases it is true to say that the question of a fraud upon the power does not seem to have been expressly argued. The question was rather whether the doctrine of election applied; but, in the next case cited to me, namely, *Roach* v. *Trood*,[29] a decision of the Court of Appeal which expressly approved *Churchill* v. *Churchill*,[30] the question of fraud was in the forefront of the plaintiff's case. Baggally J.A., who delivered the judgment of the court, said [31]: "The fact that under the provisions "of an appointment, whether such provisions appear upon the "face of the instrument itself, or are to be gathered from extrinsic "evidence, some persons who are not objects of the power may "take interests in the appointed fund, either in conjunction with "or in succession to persons who are objects of the power, is not "of itself sufficient to invalidate the appointment. The reports "abound with cases in which such appointments have been "upheld."

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[27] (1867) L.R. 5 Eq. 44.
[28] Ibid. 49.
[29] (1876) 3 Ch.D. 429.
[30] L.R. 5 Eq. 44.
[31] 3 Ch.D. 440.

The judgment then went on to consider the cases of *Beere* v. *Hoffmister*[32] and *Wellesley* v. *Earl of Mornington*,[33] which show how narrow is the dividing line between a valid and fraudulent appointment.

Finally, there was the case of *In re Holland.*[34] That was a strong case. A legatee had a power to appoint the income of a fund to her husband upon such condition and such restrictions as she should think fit. She appointed the whole income, which amounted to about £600 or £700 a year, to her husband provided that he made certain annual payments of about £100 a year to non-objects. The payment to be made to non-objects was increased to £300 a year by a codicil. Sargant J. said this[35]: "In my opinion, the difficulty in these cases is one of fact or "of inference rather than of law. The law is fairly well settled "in principle, and lays down a clear line of demarcation. If, on "the one hand, there is a genuine appointment to an object of "the power, coupled with an attempt to impose on that appoint-"ment conditions or trusts in favour of persons who are not "objects, then the appointment stands good free from the con-"ditions. If, on the other hand, there is no genuine appointment "to an object of the power, but the appointment actually made "to that object is made for purposes foreign to the power, then "the whole appointment fails as being in substance an appoint-"ment unwarranted by the power, and that whether the real "purposes of the appointment have or have not been com-"municated to the nominal appointee and assented to by "him."

Having regard to his earlier reference to certain passages in the second edition of Farwell on Powers, it is plain that the judge was referring to the doctrine of a fraud on the power.

A little later on he said[35]: "And I cannot doubt that the "testatrix had a real genuine desire to benefit her husband by "the appointment in question, and that this desire was the real "motive and object of the appointment, though there was "annexed to it a condition in favour of persons not within the "power"; and a little later[36]: "And, having once arrived at "the conclusion that the appointment made by the will was "genuine in itself, though burdened or charged with objectionable "conditions, I do not think that the mere increase of the burden "or charge affords any sufficient indication that the testatrix's

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[32] (1856) 23 Beav. 101.
[33] (1855) 2 K. & J. 143.
[34] [1914] 2 Ch. 595.
[35] Ibid. 601.
[36] Ibid. 602.

"real intention had changed from an intention to benefit her "husband to an intention to benefit other persons through him."

Probably that case had not been reported when *Vatcher* v. *Paull* [37] was argued, but the editor of the 3rd edition of Farwell on Powers plainly does not think that its authority was impaired by anything said in *Vatcher* v. *Paull.*[37] (See Farwell on Powers, 3rd ed., pp. 343 and 480.)

In the light of those authorities I think that it is my duty to express my view upon the law and not merely to follow Vaisey J., who, as I have said, did not have those authorities referred to him. With all respect to Vaisey J., I find nothing in the more recent cases which lays any greater emphasis on the doctrine than that in one of the earliest of the leading cases, *Duke of Portland* v. *Topham (Lady)*,[38] where Lord Westbury said this [39]: "the "appointor under the power, shall, at the time of the exercise of "that power, and for any purpose for which it is used, act with "good faith and sincerity, and with an entire and single view to "the real purpose and object of the power, and not for the purpose "of accomplishing or carrying into effect any bye or sinister object "(I mean sinister in the sense of its being beyond the purpose "and intent of the power) which he may desire to effect in the "exercise of the power."

I venture to think that Vaisey J. gave too literal and strict an interpretation to the words quoted earlier of Lord Parker in *Vatcher* v. *Paull.*[40] Those words must be read in the light of the earlier authorities and it must be remembered that Lord Parker was not dealing with a case where the condition imposed was to be performed by the appointees. In my judgment, "the "purpose and intention" of the appointor is to be ascertained as a matter of substance and not solely by analysing the effect of the appointment, though, of course, that is important. One must try to discover his genuine intention. In many cases contemporaneous evidence of memoranda or letters make the real purpose and intention of the appointor clear, as in *In re Crawshay* [41] and *In re Dick*,[42] and vitiate the appointment. In other cases it may be that the phraseology used in the document making the appointment makes it clear as to what was the appointor's real purpose and intention. Possibly that may serve to distinguish *In re Simpson's Marriage Settlement* [43] from this case, though the distinction seems to me one of form rather than of substance. Then, again, the surrounding circumstances by themselves may be sufficient to determine the matter one way or another, as in the cases I have mentioned which were quoted in *Roach* v. *Trood*.[44] But, in the absence of such aids to assist in determining the appointor's real purpose and intention, the mere fact that the appointor purports to attach conditions intended to compel the appointees to settle the fund or make certain payments is not, in my judgment, by itself sufficient to constitute a fraud on the power. In such circumstances the appointment to the appointees is valid, and if the condition is attached to the enjoyment of the appointed fund itself it must be rejected as being an excessive execution of the power. If, on the other hand (as here) the condition is annexed, not to the enjoyment of the appointed fund but to the testator's own property, the doctrine of excessive execution is not available. In such a case the appointee is put to his election. He can either enjoy his share of the appointed fund unfettered and forfeit his interest in the appointor's property or he can enjoy his share of the appointor's property upon the terms of settling the appointed fund.

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[37] [1915] A.C. 372.

[38] (1864) 11 H.L.C. 32.

[39] Ibid. 54.

[40] [1915] A.C. 372.

[41] [1948] Ch. 123.

[42] [1953] Ch. 343.

[43] [1952] Ch. 412.

In the present case I feel no doubt that the appointments to Ida and to the children of the second marriage were genuine appointments intended to benefit them, though as the price of enjoying residue the testator has imposed conditions with regard to the settlement of the appointed fund. Once that conclusion has been reached, and there being no surrounding circumstances and no contemporaneous evidence pointing to a contrary view, then, in my judgment, it necessarily follows that, treated as a matter of substance, the testator's purpose and intention cannot be said to be fraudulent.

For these reasons I propose to declare that the appointment under the powers contained in the 1915 settlement is not fraudulent and void but valid and effectual, and that the condition imposed in clause 11 of the codicil is also valid and effectual and binding upon the first and third plaintiffs.

UPJOHN J. then decided, on grounds which do not call for report, that the condition in clause 11 of the codicil did not require Mrs. Scott or Mrs. Lamdin to settle any interest in the funds subject to the 1924 settlements which might be appointed to them respectively after the date of the settlement to be executed by them respectively in pursuance of the said clause;

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[44] 3 Ch.D. 429.

but he declared that this decision was without prejudice to the question whether the condition in clause 11 extended to any share that might be appointed to Mrs. Scott before she executed her settlement.

The question was then argued whether Mrs. Lamdin's settlement dated December 30, 1947, effectively settled any share which might after the date thereof be appointed to Mrs. Lamdin under the 1924 settlements.

The argument on this question appears sufficiently from the judgment.

Case cited in argument not referred to in the judgment: *In re Adlard's Settlement Trusts.*[45]

UPJOHN J. The question which I now have to determine is whether the 1947 settlement catches any appointment which may hereafter be made in favour of Mrs. Lamdin under the 1924 settlements.

The 1947 settlement was executed in purported compliance with the condition contained in clause 11 of the testator's codicil. This fact appears from recital (14) in the 1947 settlement, which runs as follows: " The settlor had in order to comply with the " hereinbefore recited condition in that behalf contained in the " first codicil to the testator's said will resolved to settle in " manner hereinafter expressed her share and interests in the " funds held upon the trusts of the post-nuptial settlement the " second marriage settlement and the first supplemental " settlement."

The 1947 settlement then proceeded as follows: " Now this " deed witnesseth that in pursuance of her said resolve and for " divers other good causes and considerations the settlor hereby " declares as follows:—

"1. The bank shall henceforth retain or stand possessed of " the share appointed to the settlor under the post-nuptial settlement and also (subject to the prior life interest of her mother, the testator's widow) " of such part or share of the trust funds com- " prised in or representing or remaining subject to the provisions " of the second marriage settlement and the first supplemental " settlement as the settlor is or may become entitled to after the " death of " the widow " either in pursuance of any appointment " made by " the widow " in exercise of the power vested in her " as aforesaid or in default of any such appointment. . . ."

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[45] [1954] Ch. 29; [1953] 2 All E.R. 1437.

It is said that, so far as the 1947 settlement purported to settle Mrs. Lamdin's interest under a future appointment, it was invalid on the well-known principle that a settlement of a mere spes successionis can only operate as a contract to settle and is only enforceable if accompanied by valuable consideration. That has been established in a line of cases of which the best known is perhaps *In re Ellenborough.*[46] In *In re Brooks' Settlement Trusts*[47] Farwell J. referred to that decision and said[48] (quoting from the judgment of Buckley J.): " ' An assignment for value " ' binds the conscience of the assignor. A Court of Equity as " ' against him will compel him to do that which ex hypothesi he " ' has not yet effectually done. Future property, possibilities, " ' and expectancies are all assignable in equity for value: *Tailby* " ' v. *Official Receiver.*[49] But when the assurance is not for " ' value, a Court of Equity will not assist a volunteer. . . .' " Farwell J. continued[50]: " the reason for that being, that, since " it is merely a voluntary act and not an act for consideration at " all, the conscience of the assignor is not affected so as in equity " to prevent him from saying: ' I am not going to hand over this " ' property to which now for the first time I have become " ' entitled.' "

It is said that in the present case there was merely a voluntary settlement, but in fact the settlement was made in order to comply with the condition in clause 11 of the will to enable the settlor to enjoy benefits from the testator's residue. In these circumstances the conscience of the settlor is clearly affected. She cannot therefore say to the trustees, if and when an appointment is made to her and the funds thereby appointed fall into possession, " I am going to retain my interest in the testa- " tor's residuary estate but repudiate the settlement which I have " made, and I require you to hand over the property appointed " to me." Her conscience is bound in equity, and she must give effect to the settlement which she has made for the purpose of enjoying residue. She made her election once and for all when she executed the 1947 settlement.

I have already held that clause 11 of the codicil did not require Mrs. Lamdin to settle any interest which might be appointed to her under the 1924 settlements. But it has been conceded that she executed the 1947 settlement in the belief that she was bound

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[46] [1903] 1 Ch. 697.

[47] [1939] Ch. 993; 55 T.L.R. 914; [1939] 3 All E.R. 920.

[48] [1939] Ch. 998.

[49] (1888) 13 App.Cas. 523; 4 T.L.R. 726.

[50] [1939] Ch. 998, 999.

1954

BURTON'S SETTLEMENTS, *In re.* SCOTT *v.* NATIONAL PROVINCIAL BANK LD.

Upjohn J.

to settle any such interest in order to be able to retain her interest in the testator's residuary estate; and the present question has been argued upon the footing that clause 11 had expressly required her to settle (as she in fact purported to do) any interest which might be appointed to her under the 1924 settlements.

There is a further ground on which Mrs. Lamdin must, in my opinion, fail in her claim that any interest appointed to her under the 1924 settlements would not be caught by the 1947 settlement. As appears from the recitals in the 1947 settlement, the National Provincial Bank Ld. was the trustee of all relevant settlements, including the 1924 settlements and the 1947 settlement. Clause 1 of the 1947 settlement did not purport to be an assignment of Mrs. Lamdin's interests, but merely a direction to the bank to hold them on new trusts. In the circumstances, the assistance of a court of equity is not required, since the bank, as trustee of the 1924 settlements, already holds all the relevant funds. Accordingly, the principle of *In re Ellenborough* [51] could not apply here.

I shall therefore declare that the 1947 settlement effectively settled any share which might after the date thereof be appointed to Mrs. Lamdin under the 1924 settlements.

Declarations accordingly.

Solicitors: *Speechly, Mumford & Craig; Routh, Stacey & Castle; Stileman, Neate & Topping.*

I. G. R. M.

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[51] [1903] 1 Ch. 697.

1954
Oct. 13.

Roxburgh J.

In re LEWIS, DECD.
PUBLIC TRUSTEE *v.* ALLEN AND OTHERS.

[1953 L. No. 2759.]

Charity—Aged, impotent and poor—Blind—Bequest to "10 *blind girls* "*Tottenham residents if possible . . .*"*—Similar bequest to* 10 *blind boys—Relief of* "*aged, impotent and poor*"*—Words read disjunctively—Valid charitable bequest—Statute of Elizabeth I,* 1601 (43 *Eliz.* 1, *c.* 4).

A testator made the following bequest: "I leave to 10 blind girls "Tottenham residents if possible the sum of £100 each. I leave "to each of 10 blind boys Tottenham residents if possible the sum "of £100 each."

The court was asked to determine whether that bequest constituted a valid charitable gift as coming within the wording of the preamble to the Statute of Elizabeth, "aged, impotent and "poor":—

Held, that the words "aged, impotent and poor" must be read disjunctively, and that poverty was not therefore an essential ingredient; accordingly, this constituted a valid charitable bequest.

In re Fraser (1883) 22 Ch.D. 827; *In re Glyn Will Trusts* [1950] W.N. 373; 66 T.L.R. (Pt. 2) 510; [1950] 2 All E.R. 1150n.; and *In re Robinson* [1951] Ch. 198; [1951] 1 T.L.R. 132; [1950] 2 All E.R. 1148 applied.

Dictum in *In re Lucas* [1922] 2 Ch. 52 not followed.

ADJOURNED SUMMONS.

By his will dated January 9, 1946, Mark Albert Lewis, after making pecuniary bequests to individuals, and a number of charitable bequests, added the following dispositions: "I leave to 10 "blind girls Tottenham residents if possible the sum of £100 "each. I leave to each of 10 blind boys Tottenham residents if "possible the sum of £100 each. I leave to the Salvation Army "for their welfare work in England the sum of £500."

The testator then gave directions as to the payment of death duties. He died on November 24, 1948.

The question on the summons relevant to this report was whether the bequest to 10 blind boys and 10 blind girls constituted a valid charitable trust.

Hubert Rose for the plaintiff, the Public Trustee.

J. A. Gibson for the Treasury Solicitor. This bequest does not constitute a valid charitable gift within the preamble to the Statute of Elizabeth. In the case of a gift for the relief of impotent persons, the words "aged, impotent and poor" should be construed disjunctively so that a trust for the relief of impotent persons is only charitable if its objects are also poor persons. The question of the proper construction of this part of the preamble is as old as the statute itself: see *Attorney-General* v. *Haberdashers' Co.*,[1] *per* Lord Brougham. The only decision after reported arguments on a trust for the blind is *In re Elliott*,[2] and in that case Parker J. found an element of poverty in the testator's requirements. In *In re Fraser* [3] it was held that a trust for the relief of blind persons was charitable, but the case is not reported on this question—whether the trust was a valid charitable trust or not—and the reasons for the decision on that point are not given.

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[1] (1834) 1 My. & K. 420, 428.

[2] (1910) 102 L.T. 528.

[Roxburgh J. Is there any case in which the statute has been analysed or construed on this point?]

It was examined by Russell J. in *In re Lucas*,[4] a case on the analogous point of the charitable nature of a trust for the relief of aged persons, in which the earlier decisions on that point were also examined, and his conclusion, after examining the authorities, is that a trust for the relief of aged persons can only be charitable if the aged persons are also poor.

[Roxburgh J. But there is no case pointing to that conclusion so far as trusts for impotent persons are concerned?]

No; but on principle there can be no distinction in this respect between trusts for the relief of aged persons and trusts for the relief of impotent persons.

Denys Buckley for the Attorney-General. *In re Lucas* [4] does not really decide that the words in the statute must not be read disjunctively, for Russell J. found on the facts of that case that there was an ingredient of poverty in the form of the gift itself, so that his remarks that he would have felt compelled by the authorities to hold that a gift for the aged per se could not be charitable were, in the circumstances, obiter. Danckwerts J. in *In re Glyn Will Trusts* [5] did not feel compelled to follow the dictum of Russell J. in *In re Lucas*,[6] and he said that the words "aged, impotent and poor" must be construed disjunctively; Vaisey J. followed that decision in *In re Bradbury* [7] and *In re Robinson*.[8]

No case, apart from those already cited, suggests that impotence alone would not qualify as being charitable. In *In re Fraser* [9] a bequest to be invested for the "benefit of the blind in Inverness-"shire" was treated as charitable; although there was no argument or judgment reported, the court would not have made an order in terms embodying that bequest unless it felt satisfied that it was charitable.

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[3] (1883) 22 Ch.D. 827.

[4] [1922] 2 Ch. 52.

[5] [1950] W.N. 373; 66 T.L.R. (Pt. 2) 510; [1950] 2 All E.R. 1150n.

[6] [1922] 2 Ch. 52.

[7] [1950] W.N. 558; [1951] 1 T.L.R. 130; [1950] 2 All E.R. 1150n.

[8] [1951] 1 Ch. 198; [1951] 1 T.L.R. 132; [1950] 2 All E.R. 1148.

[9] 22 Ch.D. 827.

Apart from *In re Lucas*,[1] where the decision on this point was obiter, the trend of all recent decisions has been to read the statute disjunctively, and the court should follow that interpretation in the present case and hold this to be a valid charitable gift.

Michael Bowles and *J. L. Arnold* for defendants representing claimants under the bequest were not called upon to argue.

The first defendant appeared in person but was not concerned with this question.

ROXBURGH J., after reading the bequest in the will: I have only read the bequest to the Salvation Army to indicate that the bequest on which I have to adjudicate, namely, the bequest to 10 blind girls and each of 10 blind boys, is inserted among a series of charitable gifts; but I do not propose to base my judgment upon such an adventitious circumstance. I propose to grasp the nettle and to decide rightly or wrongly whether a gift for the benefit of blind persons as a class—not as individuals, of course—is a charitable gift. I say at once that I find nothing in this will in connexion with these two bequests which imports any element of poverty whatsoever.

My problem is a simple one, and I should not have had to refer to the much more difficult problem recently before Danckwerts and Vaisey JJ., but for the able argument which has been presented to me and which, therefore, I wish to consider carefully.

It is undoubtedly true that Russell J. in *In re Lucas*[1] indicated plainly that he would hesitate to hold that a gift for the benefit of "aged persons" was charitable per se. I can well understand his reluctance. It appears to me that so to hold opens the doors of charity very wide. None the less, it is plain that he did not hesitate so to hold because he put any unusual construction on the meaning of the words of the Statute of Elizabeth, but because of a line of cases to which he referred. In the end, as has happened in so many other cases, by finding a context satisfactory to him to import poverty, he escaped from the necessity of reaching a decision which he undoubtedly would have found difficult. Mr. Gibson was inclined to say that Russell J. indicated that he would not have decided that a gift for "aged "persons" per se was charitable. I do not think that he went as far as that, but he undoubtedly indicated a great disinclination to decide that a gift for "aged persons" per se was charitable,

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[1] [1922] 2 Ch. 52.

1954

LEWIS, DECD., *In re.* PUBLIC TRUSTEE *v.* ALLEN.

Roxburgh J.

and Mr. Gibson suggests that he reached his state of disinclination by the manner in which he construed the statute. That, I think, is not so. He reached his disinclination possibly to some extent on practical grounds, but mainly in the light of certain authorities about aged persons, not about blind persons.

Mr. Gibson's argument was to this effect: prima facie, when the statute speaks of "aged, impotent and poor," it must envisage three classes: (1) aged, (2) impotent, (3) poor. But he argued that, having regard to the hesitation of Russell J. and his predecessors to hold that it was enough to be aged, it was necessary not to read the words disjunctively, but to say that "poor" was an essential ingredient in each class. The illogicality of that appears to be that poor persons would not then qualify unless they were either aged or impotent; and that is quite contrary to authority and, indeed, to the good sense of the matter. I think that the answer to Mr. Gibson must be that his reasoning is quite illogical and that the statute bears the prima facie meaning that it would appear to have; that there are three classes; and that the hesitation which Russell J. felt (founded mainly on earlier decisions, but partly, I think, upon the obvious practical disadvantages of holding that "aged" per se was enough) was not the result of an illogical construction of the statute.

I would have hesitated to speak so strongly about a judgment of Russell J. were it not for the fact that first of all Danckwerts J. and then Vaisey J. have cut the painter in no uncertain manner. I will refer to the judgment of Danckwerts J. in *In re Glyn Will Trusts*,[2] where he is reported as saying[3]: "The preamble to the "Poor Relief Act, 1601, referred to the relief of aged, impotent "and poor people. The words 'aged, impotent and poor' should "be read disjunctively. It had never been suggested that poor "people must also be aged to be objects of charity, and there "was no reason for holding that aged people must also be poor "to come within the meaning of the preamble." If (as I suspect) the judge meant "no logical reason," I heartily agree with that observation, although I must confess that I should have thought that so far as "aged" is concerned, the earlier cases did create some difficulty, perhaps more difficulty than Danckwerts J. felt. Then Danckwerts J. referred to *In re Lucas*,[4] in which many of the earlier cases are carefully summarized, and he said "that a

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[2] [1950] W.N. 373; 66 T.L.R. (Pt. 2) 510; [1950] 2 All E.R. 1150n.

[3] [1950] W.N. 374.

[4] [1922] 2 Ch. 52.

"trust for the relief of aged persons would be charitable unless "qualified in some way which would clearly render it not "charitable."

Vaisey J., in *In re Robinson*,[5] took the same line. He also said that the statute must be read disjunctively, and he held that "the old people over 65 years" in a particular parish were a class of persons who were proper objects of charity (in the legal sense) merely because they were over 65 years of age and, therefore, aged.

I do not wish it to be thought that I am in any way differing from those decisions. I warmly approve of them, but I must confess that they have shown perhaps greater boldness in this matter than I might have shown if I had been concerned with the word "aged" per se. Fortunately for me, my path is very much easier. There is no case which suggests that in the case of impotent persons, the statute should not be read properly, that is to say, disjunctively, so as to constitute impotent persons as a class per se. On the contrary, there is a case of venerable antiquity in which it was done: that is *In re Fraser.*[6] Unfortunately, the case is not reported on that point, and it is not possible to know for certain whether there was any argument or whether the judge gave reasons for his judgment; but I may say that there is no reason whatever to suppose that it was not argued or that the judge did not give reasons. It is not usual for the court to make a declaration in a case which is not argued.

The words in *In re Fraser*[6] were "to be invested for the "benefit of the blind in Inverness-shire." Nobody would suggest that there was anything there to import poverty, and the court declared[7] "that the residue was effectually given to the testator's "executors and two or more trustees to be appointed by them, in "trust for the benefit of the blind in Inverness-shire. And the "court directed a reference to the Court of Session in Scotland to "settle a scheme for the administration of the charity." That is a clear decision.

It is true that Parker J. in 1910, in *In re Elliott*,[8] was clearly under the influence of what I may call the *In re Lucas*[9] standpoint, because considering the matter apart from authority he thought it necessary, or at any rate desirable, to consider whether in the gift which he had to construe there was an element of poverty, and he arrived at the conclusion that there was. It is

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[5] [1951] Ch. 198; [1951] 1 T.L.R. 132; [1950] 2 All E.R. 1148.

[6] (1883) 22 Ch.D. 827.

[7] Ibid. 828.

[8] (1910) 102 L.T. 528.

[9] [1922] 2 Ch. 52.

1954

LEWIS, DECD., *In re.* PUBLIC TRUSTEE *v.* ALLEN.

Roxburgh J.

fairly to be said, as Mr. Gibson did say, that Parker J. thought that it was in principle necessary to find an element of poverty in order to be sure that it was a charitable gift. Parker J. did not say how that could be consistent with a proper construction of the statute, but he did further say [10]: "At the same time"—which, I think, in this context really means "however that may be"—"I think that I could not, without in effect overruling several "decisions, hold that this is not a good charitable gift." Then he referred to *In re Fraser* [11] and *In re Dudgeon.*[12] From that I infer that if Parker J. had failed to find any element of poverty, though he might have doubted whether to hold that the gift was charitable was in accordance with principle, he would have felt bound so to hold by authority.

It is that which makes my task today easier—much easier than that of Parker J.—because I am happy to be bound by the authority of *In re Fraser*,[13] which appears to me to be the inevitable result of the only interpretation of the statute which does not lead to an absurd conclusion. In that respect, I am completely at one with Danckwerts and Vaisey JJ.

I declare that the gifts of £100 each to "10 blind girls Totten-"ham residents if possible," and of £100 to "each of 10 blind "boys Tottenham residents if possible" constitute valid charitable gifts. The Public Trustee is authorized by way of scheme (1) to pay or apply for the benefit of 10 blind girls the sum of £100 each, such blind girls to be resident in Tottenham if any suitable objects of charity are there resident, and, if not resident, anywhere in the world, and (2) to make a similar application in the case of 10 blind boys.

Declaration accordingly.

Solicitors: *Pearce & Nicholls; Treasury Solicitor.*

I. G. R. M.

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[10] 102 L.T. 528, 530.

[11] 22 Ch.D. 827.

[12] (1896) 12 T.L.R. 465; 74 L.T. 613.

[13] 22 Ch.D. 827.

DEVERALL *v.* GRANT ADVERTISING INC.

C. A.

1954
Oct. 21,
22, 25.

Jenkins,
Hodson and
Romer L.JJ.

Company—Party to action—Writ—Service—Foreign company—Whether "any place of business established . . . in Great Britain"—Service after business within jurisdiction (if any) ceased—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 406, 412.
Practice—Writ—Service on foreign company.

By section 412 of the Companies Act, 1948, if an oversea company which has established a place of business in Great Britain, makes default in delivering to the registrar of companies particulars to enable proper service of notices and process to be made on it, "a document may be served on the company by leaving "it at or sending it by post to any place of business established by "the company in Great Britain."

The words "any place of business established . . . in Great "Britain" mean a place of business established at the time of service. They do not include a former place of business which is no longer such at the material time.

Sabatier v. *Trading Company* [1927] 1 Ch. 495 distinguished.

Observation of Lord Reading in *Porter* v. *Freudenberg* [1915] 1 K.B. 857 at p. 888; 31 T.L.R. 162 applied.

Decision of Vaisey J. reversed.

APPEAL from Vaisey J.

The following statement of the facts is taken from the judgment of Jenkins L.J.: The defendants, Grant Advertising Inc., a company incorporated under the laws of the State of Texas in the United States of America, and resident in that country, appealed from an order of Vaisey J. dated June 30, 1954, refusing an application by the corporation to set aside the service on it of the writ in an action brought against them by the plaintiff, Peter Edmund Deverall.

The corporation (the "American company") carried on the business of practitioners in advertising, not only in the United States of America, but elsewhere, by means of a large number of subsidiary companies incorporated under the appropriate local laws and by unincorporated branches in many parts of the world. The subsidiaries included a company called Grant Advertising Ld., an English company which carried on business in the United Kingdom and which had a place of business, or office, at 36, Grosvenor Street, London, W.1. The plaintiff alleged that the defendant company had also established a place of business there, although the company had not complied with section 407

C. A.
1954

DEVERALL
v.
GRANT
ADVERTISING
INC.

of the Companies Act, 1948 [1]; but he admitted that it had ceased to be such a place of business before the date on which the writ was served.

The relief claimed by the writ concerned the amounts due, or alleged to be due, to the plaintiff, under an agreement dated February 1, 1953, whereby, for the consideration therein mentioned, he agreed to resign the office which he had theretofore held for six or seven months as regional director of the American company in the sterling area, and also the offices which he had concurrently held of director and chairman of directors of the English company.

The service of the writ relied on by the plaintiff consisted in leaving a copy of it at 36, Grosvenor Street on February 19, 1954. That mode of service was sought to be justified, and was successfully justified before Vaisey J., on the ground that 36, Grosvenor Street was, on the facts of the case, a place of business established by the American company in Great Britain within the provisions regarding oversea companies contained in Part X of the Companies Act, 1948, and that as the American company had not complied with section 407 of the Act of 1948, and had failed to deliver to the registrar the required particulars, service could be effected in accordance with the provisions of section 412 of that Act.[1]

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[1] Companies Act, 1948, s. 406: "The next eight following sections "shall apply to all oversea com- "panies, that is to say, companies "incorporated outside Great Britain "which, after the commencement of "this Act, establish a place of busi- "ness within Great Britain, and "companies incorporated outside "Great Britain which have before "the commencement of this Act, "established a place of business "within Great Britain and continue "to have an established place of "business within Great Britain at "the commencement of this Act."

S. 407 requires oversea companies to deliver to the registrar of companies for registration certain documents and particulars, including, "the "names and addresses of some one "or more persons resident in Great "Britain authorized to accept on "behalf of the company service of "process and any notices required to "be served on the company."

S. 412: "Any process or notice "required to be served on an oversea "company shall be sufficiently served "if addressed to any person whose "name has been delivered to the "registrar under the foregoing pro- "visions of this Part of this Act "and left at or sent by post to "the address which has been so "delivered: Provided that—(a) where "any such company makes default in "delivering to the registrar the name "and address of a person resident in "Great Britain who is authorized to "accept on behalf of the company "service of process or notices; or (b) "if any time all the persons whose "names and addresses have been so "delivered are dead or have ceased so "to reside, or refuse to accept service "on behalf of the company, or for "any reason cannot be served; a "document may be served on the "company by leaving it at or sending "it by post to any place of business "established by the company in "Great Britain."

S. 414: "If any oversea company

It was admitted that, if the service relied on could not be justified by reference to section 412 of the Act, it must have been bad service. The defendant corporation appealed.

J. G. S. Hobson for the American corporation. The corporation has never established a place of business within the jurisdiction, and therefore section 407 has no application and the default provisions contained in section 412 do not come into operation. Even if the company had at one time established a place of business within the jurisdiction (which is not admitted) it had ceased to carry on business there at the time when the purported service was made. A valid service could not then be made at that place under section 412, which only permits service on a foreign company at the place which is the place of business of the company at the time when the service is effected. The provisions as to service are designed to ensure as far as possible that the service will be brought to the notice of the person affected, but if service was made at the old address, the writ might not come to the company's notice. If such a service were valid it would, for example, be possible to serve a foreign company at the address of an exhibition at which the company had once exhibited (see *Dunlop Pneumatic Tyre Co. Ld.* v. *Actien-Gesellschaft für Motor und Motorfahrzeugbau vorm. Cudell & Co.*[2]), or possibly at an hotel at which the directors had carried on business for a short time.

Vaisey J. followed *Sabatier* v. *Trading Company*,[3] but there the question was whether, after a company had ceased to carry on business, service could be effected on the person whose name had been filed by the company with the registrar of companies as authorized to accept service on behalf of the company and whose name was still on the register. The relevant statutory provisions in the Companies (Consolidation) Act, 1908, were different from those which have to be considered here. The Act of 1908 did not contain a provision, such as that in section 412 of the Act of 1948, for default service; nor was there any provision releasing a company from the obligation to deliver particulars to

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"fails to comply with any of the "foregoing provisions of this Part of "this Act the company, and every "officer or agent of the company who "knowingly and wilfully authorizes "or permits the default, shall be "liable to a fine not exceeding fifty "pounds, or, in the case of a continuing offence, five pounds for every "day during which the default continues."

[2] [1902] 1 K.B. 342; 18 T.L.R. 229.

[3] [1927] 1 Ch. 495.

the registrar if it ceased to have a place of business within the jurisdiction. The difficulties which arose when a company ceased to carry on business within the jurisdiction were discussed in *Employers' Liability Assurance Corporation Ld.* v. *Sedgwick, Collins & Co. Ld.*[4] Provision was first made for default service by section 91 of the Companies Act, 1928, re-enacted in section 349 of the Act of 1929. Section 349 was considered in *The Madrid*,[5] and Bucknill J. seems to have taken as the test of the validity of the service whether it was made at the place of business of the company [6]; but the effect of the company having ceased to carry on business was not discussed.

N. E. Wiggins for the plaintiff. The American company is subject to service even though it may have ceased to have a place of business here. The principle in *Sabatier* v. *Trading Company* [7] is not limited to cases where the company has registered particulars. A company which has established a place of business here is under a legal obligation to register the particulars, and a company which has defaulted cannot be in any better position than a company which, as in *Sabatier* v. *Trading Company*,[7] has complied with the statutory obligation. That case is not distinguishable on the difference between the statutory provisions; even in the present section 413 of the Act of 1948 no provision is made for removing the name of a nominated person from the register. Section 413 (2) merely says that if the company cease to carry on a business and give the necessary notice to the registrar it will no longer be subject to the penal provisions. There is no valid reason why, if the company has been carrying on business here, it should not be sued in respect of obligations incurred. Proceedings would normally be commenced while the company were still carrying on business here or within a short time thereafter, and it is unlikely that the service would not come to the notice of the company if sent to the place where business had been carried on. If, however, the notice did not reach them and judgment was obtained by default, the judgment would be bound to come to the company's notice when attempts were made to enforce it, and the company could then apply to the court for the judgment to be set aside.

Section 406 refers to a place of business established at any time. The further clause "continue to have an established

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[4] [1927] A.C. 95; 42 T.L.R. 749.

[5] [1937] P. 40; 53 T.L.R. 237; [1937] 1 All E.R. 216.

[6] [1937] P. 40, 45.

[7] [1927] 1 Ch. 495.

"place" refers to the date of commencement of the Act. The principle in *Sabatier* v. *Trading Company*[7] was upheld by the House of Lords in *Employers' Liability Assurance Corporation Ld.* v. *Sedgwick, Collins & Co. Ld.*[8]

JENKINS L.J., having stated the facts set out above and read sections 406, 407, 412 and 414 of the Companies Act, 1948, continued: The American company did not comply with the provisions of section 407, for the simple reason that it never occurred to them that they had established a place of business in Great Britain. If they had established such a place of business, the appropriate mode of service was that indicated by section 412; that is to say, by leaving the document in question at, or sending it by post to, any place of business established by the company in Great Britain.

In these circumstances, two questions have been argued both before the judge and before us. The first question is whether the American company had at any time established a place of business in Great Britain, the place suggested, if there was one, where the company had so established a place of business being 36, Grosvenor Street. The second question arises in this way: admittedly, the allegation that the American company had established a place of business at 36, Grosvenor Street depends entirely on the duties assigned to the plaintiff as director of the company for the sterling area, and the activities which he pursued as the holder of that office at 36, Grosvenor Street. He resigned that office on February 1, 1953. Thereafter nothing was going on at 36, Grosvenor Street, and there were no physical indications at that address on the strength of which it could be claimed that it was a place of business established by the American company. The second question, therefore, is whether, even if the plaintiff were to succeed in showing that the company had at any time established a place of business at 36, Grosvenor Street, the service relied on could be good, inasmuch as, admittedly, 36, Grosvenor Street had ceased to be a place of business established by the company before the date on which the writ was served.

[His Lordship considered the evidence pertinent to the question whether the American company had at any time established a place of business in Great Britain (a matter which does not call for report). His Lordship concluded:] The plaintiff on

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[7] [1927] 1 Ch. 495.

[8] [1927] A.C. 95.

C. A.
1954

DEVERALL
v.
GRANT
ADVERTISING
INC.

Jenkins L.J.

this evidence has wholly failed to show that the American company ever established a place of business within Great Britain.

That is sufficient to dispose of this case without considering the second question whether, assuming that by reason of the plaintiff's employment and activities at 36, Grosvenor Street, the American company had established a place of business in Great Britain, service on them at that place of business could be validly effected under section 412 of the Act having regard to the admitted fact that from and after the plaintiff's departure and resignation from the office of regional director for the sterling area, no ground remained for holding that 36, Grosvenor Street was a place of business established by the company in the sense of a then existing place of business established by the company. But as this second question has been argued before us, and Vaisey J. has expressed his view on it, I think it is right that I should consider it briefly.

The question is whether the words "any place of business "established by the company in Great Britain" in section 412 mean any existing place of business established by the company, or mean any place where the company has at any time established a place of business: in other words, in order to make the service in accordance with section 412 a good service, is it necessary to be able to say of the place where service is effected that at the time when it is effected, "This is a place of business established "by the company in Great Britain", or is it enough if it can be shown of the place where service is effected that at the time when it is effected, "This was at one time a place of business of "the company, although it is no longer such"?

Some light on that question is, I think, thrown by the language of section 406, which states that that section and "the "next eight following sections shall apply to all oversea com-"panies," and then proceeds to define oversea companies as "companies incorporated outside Great Britain which, after the "commencement of this Act, establish a place of business "within Great Britain, and companies incorporated outside "Great Britain which have, before the commencement of this "Act, established a place of business within Great Britain and "continue to have an established place of business within "Great Britain at the commencement of this Act." A distinction is there indicated between companies which establish a place of business within Great Britain after the commencement of the Act and companies which have established a place of business within Great Britain before such commencement, in that the latter, in order to come within section 406, must continue to have an established place of business within Great Britain at such commencement. That throws some light on the construction of section 412, for it does not seem to accord with the view that, for the purposes of that section, once a company has established a place of business it must always remain a place of business established by the company.

Apart from that indication, the grammatical meaning of the language of section 412, " by leaving it at or sending it by post " to any place of business established by the company in Great " Britain," to my mind requires that the place of service should be a place which at the time of the service is then established as a place of business of the company. The other construction would lead to somewhat absurd results. A company might establish a place of business, carry on business there for a time, and then might cease to do business there, leaving no trace at all of any continued business connexion with the former address. The legislature could hardly have intended that, in such a case, service could be effected at the former place of business of the company, for service at that place would not be in the least likely to bring the proceedings to the notice of the company. Again, an oversea company might occupy successively a number of places of business, moving perhaps from Birmingham to Newcastle and thence to London. If section 412 is construed as meaning service at any former place of business, then a person desirous of effecting service on a company in the case which I have supposed might effect good service by leaving the document at the premises in Birmingham or Newcastle, without troubling about those in London, though that would be the one place at which the company intended to be served was in fact carrying on business, and was the one place at which a process could be served with reasonable certainty that it would be brought to the notice of the company.

Vaisey J. took a different view, and he did so largely on the strength of *Sabatier* v. *Trading Company*,[1] a decision of Clauson J. To my mind, there is an essential and vital distinction between that case and the present. *Sabatier* v. *Trading Company* [1] was decided in 1927, when the relevant Act was the Companies (Consolidation) Act, 1908. That Act contained in section 274 provisions corresponding to those of section 407 of the Act of 1948; that is to say, there was a provision to the effect that every company incorporated outside the United Kingdom which established a place of business within the United Kingdom should file with the registrar of companies, among other things, "the names and addresses of some one or more persons resident "in the United Kingdom authorized to accept on behalf of the "company service of process and any notices required to be "served on the company"; but there was no provision comparable to section 412 of the present Act, which provides a method of service which can be used in the case of a company which has not filed with the registrar of companies the names and addresses of persons who are authorized to accept service. In *Sabatier* v. *Trading Company*[1] the company in question had filed with the registrar of companies the name of a person authorized to accept service; and it was held that service on that person was good, even if the company had ceased to carry on business in the United Kingdom before the date on which such service was effected.

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[1] [1927] 1 Ch. 495.

The conclusion reached by Clauson J. is thus stated in the headnote: "*Held*, (1) that upon the evidence, the defendant "company, at the date of the service of the writ upon A. [the "managing director of the defendant company], had a place "of business within the United Kingdom, within the meaning "of section 274 of the Companies (Consolidation) Act, 1908, "and that service upon A. was effective service upon the company; and (2)"—and this is the material part of the case—"that, even if the company had not at the date aforesaid a "place of business within the United Kingdom, yet upon the "true construction of the section and applying the principles of "the decision in *Employers' Liability Assurance Corporation Ld.* "v. *Sedgwick, Collins & Co. Ld.*,[2] such service was effective "service upon the company."

In my view, the second decision in *Sabatier* v. *Trading Company*[3] has no application to the present case. Where, in compliance with section 407 or its predecessor, the name and address of some person authorized to accept service on behalf of the company is delivered to the registrar of companies, then, by the Act, service on that person is made good service, so long as his name continues on the file, and the person effecting service is in no way concerned with the question whether the company has at that time a place of business in Great Britain. The service can be effected on the very person whose name has been filed as the name of the person authorized to accept service. Where section 412 is in question, service must be effected at a place of business established by the company, and, in my view, if the company no longer has a place of business established at the place where service is sought to be effected, the language of the section is not complied with.

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[1] [1927] 1 Ch. 495.

[2] [1927] A.C. 95; 42 T.L.R. 749.

[3] [1927] 1 Ch. 495.

Mr. Wiggins, for the plaintiff, argued that the principles of *Sabatier* v. *Trading Company* [3] ought to be applied, as otherwise an oversea company which failed to comply with the provisions of the Act would get an advantage from its own wrong, inasmuch as if it had complied with the Act it could have been served by service on the person whose name had been filed for that purpose. In my view, that argument carries little weight. The question is, what is the mode of service which must be followed in order to satisfy section 412. I think it must, according to the terms of the section, be service at an existing place of business established by the company. Whether the place at which service is sought to be effected is an existing place of business for that purpose must, no doubt, depend on the facts of any particular case. There might, for instance, be an oversea company which had traded at a particular place and had contracted, and otherwise carried on business by correspondence, on notepaper bearing the address of that place, or had allowed its name to appear in a telephone directory or in some other form of directory as carrying on business at that address. In such a case where a company has held itself out as carrying on business at a given address, it may well be that if the company has done nothing in the way of giving notice to the contrary to persons dealing with it, any such person, for the purpose of service, might be entitled to assume that the place thus held out by the company as a place of business established by it was still such a place of business, even if the company had ceased actually to carry on business there. But this is not a case of that sort, and, in my view, it cannot be said that, at the time when service was effected at 36, Grosvenor Street, that that was a place of business established by the American company.

I have not referred to the various authorities quoted to us in the course of the argument on the first question. Those authorities show that the question whether a place of business has been established here or not is a question of fact to be determined on the evidence in each particular case, and on the evidence here the establishing of a place of business was not, in my view, made out. On the second question also, I feel obliged to differ from Vaisey J. and to hold that, even if I am wrong on the first question, the service effected at 36, Grosvenor Street was not good service under section 412.

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[3] [1927] 1 Ch. 495.

For these reasons I would allow this appeal, and direct that an order should be made setting aside the service of the writ in this action.

HODSON L.J. I agree with the judgment which my Lord has delivered on both questions raised on this appeal, and although we are differing from the judgment of the judge, I cannot usefully add anything.

ROMER L.J. I also agree with my Lord's judgment on both points. On the first point I have nothing to add beyond saying that it is plain to me that the plaintiff assumed the burden in this matter of showing that the American company did, at all events at one time, carry on business in this country, and inasmuch as the only way in which it ever carried on business, if it did so at all, was through the medium of the plaintiff's own activities, the plaintiff's reticence on the question of what those activities were prevents him, in my opinion, from discharging the onus which he undertook.

On the question of section 412, it appears to me that, taking the language of the proviso to that section by itself, there is no warrant for including in the word " company " a company which at some time previously had established a place of business, but no longer had one at the date of the writ. The contrary argument involves reading the words at the end of the proviso as though they had read " a place of business established, or which " had at any earlier time been established, by the company in " Great Britain," and there appears no justification for reading into the proviso words which are not there, however, the prima facie construction is supported by the language of section 406.

The intention which underlies all procedure with regard to substituted service is that the defendant will probably get to hear of the proceedings. That was very clearly laid down by this court in the well-known case *Porter* v. *Freudenberg*,[4] in which the full Court of Appeal dealt with an action against an enemy alien. One of the points which Lord Reading C.J., who delivered the judgment of the court, considered was that of substituted service. He said [5]: "In order that substituted "service may be permitted, it must be clearly shown that the "plaintiff is in fact unable to effect personal service and that "the writ is likely to reach the defendant or to come to his "knowledge if the method of substituted service which is asked "for by the plaintiff is adopted." Later he said [6]: "Our "English procedure has hitherto been laudably superior to the "Continental in not permitting that which may be called 'con"'structive service,' such as, for example, by public notices "or advertisements, whereby a defendant may be condemned "unheard because he has no knowledge of the proceedings "against him."

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[4] [1915] 1 K.B. 857; 31 T.L.R. 162.

If service of a writ or some other document is effected at the place of business which a foreign corporation actually has in this country, or on a nominee whom it has registered, the probability is that service at such place of business, or on such nominee, will become known to the corporation; but service at a place which has ceased to be the place of business, and which may well have passed, and probably will have passed, into the ownership of some third person, would seldom come to the notice of the foreign corporation. It appears to me that this consideration, as against the general background of the substituted service procedure to which I have referred, supports the view, if any support be needed, that the proviso to section 412 must be given the meaning which its language naturally bears, and not the artificial meaning which the plaintiff sought to attribute to it in this case. I, accordingly, agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Waterhouse & Co.; Parker, Sloan & Pinsent.*

E. D.

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[5] [1915] 1 K.B. 857, 888.

[6] Ibid. 889.

1954
Oct. 13.

Harman J.

In re OVERBURY, DECD.
SHEPPARD *v.* MATTHEWS AND OTHERS.

[1950 O. 1636.]

Legitimacy—Presumption—Birth certificate—Spouses married six months—Death of husband—Birth of child within nine months of the death—Remarriage of wife three months before birth of child—Second husband registered as father—Evidence—Presumption of legitimacy as child of first husband—Presumption of accuracy of statements in birth certificate—Conflict of presumptions.

Presumption—Rebuttable.

On July 4, 1868, M., a spinster, married R. On January 26, 1869, R. died from injuries sustained in an accident. On July 27, 1869, M. married S. On September 24, 1869, M. gave birth to a daughter. On the birth certificate M. gave the child's second Christian name as R. but gave the child's father as S. In 1941 the daughter died intestate without leaving any issue. On a summons taken out during the course of an inquiry as to her next-of-kin for the opinion of the court whether R. or S. was the lawful father of the intestate:—

Held, that the presumption of law that a child born within the normal period of gestation after the death of his mother's husband was the legitimate offspring of that husband, was not rebutted, in the absence of other evidence, by the mere fact that the mother had remarried before the birth of the child, and had stated in the birth certificate that her second husband was the father of the child; further this presumption should prevail over the presumption that the child was the offspring of the man who was married to the mother at the date of birth. Accordingly, it should be declared that R. was the lawful father of the intestate.

In re Heath [1945] Ch. 417; 61 T.L.R. 554 considered.

ADJOURNED SUMMONS.

On July 4, 1868, Matilda Mock, a spinster aged 21, married George Rawlings, a widower, aged 36. On January 26, 1869, George Rawlings died, the cause of death being given in the death certificate as a compound fracture of the upper and lower jaws causing haemorrhage and exhaustion. There was no evidence as to the time which elapsed between the date of the accident and the date of death. On July 27, 1869, Matilda Rawlings, formerly Mock, married John William Sheppard. On September 24, 1869, Matilda Sheppard gave birth to a daughter. In the birth

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[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

1954

OVERBURY, DECD., *In re.* SHEPPARD *v.* MATTHEWS.

certificate the child's Christian names were given as "Matilda "Rawlings," the father was described as "John William Sheppard," and the mother as "Matilda Sheppard, late Rawlings, "formerly Mock." The informant was "M. Sheppard."

In March, 1901, Matilda Rawlings Sheppard married Horace Overbury, and on May 28, 1941, she died intestate, her husband surviving her for some 18 months. The intestate had no issue and her next-of-kin had to be traced through her father and mother, but there was a conflict in the circumstances between persons claiming to be relations on her father's side. Accordingly, the personal representative of the intestate issued an originating summons for the determination of the question whether the persons interested in the estate of the intestate ought to be ascertained on the footing that her father was George Rawlings, the first husband of the intestate's mother, or John William Sheppard, her second husband. This was heard by Roxburgh J., who ordered an inquiry as to what person or persons on the death of the intestate became beneficially entitled either absolutely or contingently to any property of hers as to which she died intestate.

It was found impracticable to proceed with the inquiry before determination of the preliminary question as to the intestate's paternity. Accordingly the present summons was taken out under R.S.C., Ord. 55, r. 69, for the opinion of the court whether the persons beneficially interested in the estate of the intestate ought to be traced on the footing that George Rawlings or John William Sheppard was the lawful father of the intestate.

T. K. Wigan for the plaintiff.

G. D. Morton for the first defendant, representing the second husband's relations. The intestate was born within nine months of the dissolution of her mother's marriage by the death of her husband but after her mother had married a second time. In those circumstances there would appear to be a conflict between two well-known presumptions of law, namely, (1) that a child born within the normal period of gestation after the death of the mother's husband is presumed to be the legitimate child of that husband, and (2) that a child born during lawful wedlock is presumed to be a child of the marriage. [*In re Heath*[1] was referred to.] These presumptions cancel each other out. There remains on the evidence the fact that Sheppard was entered on

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[1] [1945] Ch. 417, 421.

1954

OVERBURY, DECD., *In re.* SHEPPARD *v.* MATTHEWS.

the birth certificate as the father of the intestate. Entries in birth certificates are some evidence of the truth of what they state: *In re Stollery* [2]; accordingly, in the present case, the statements in the birth certificate should be accepted as evidence that Sheppard was the intestate's father. The available evidence supports this contention: in the intestate's marriage certificate her maiden name is given as "Sheppard."

A. P. McNabb for the second defendant, representing the first husband's relations. In the absence of any evidence to the contrary, the court should assume that the intestate was issue of lawful intercourse and not of an adulterous union: *Morris* v. *Davies*.[3] If the intestate's mother had not remarried there can be no doubt that the intestate would be regarded in law as the legitimate offspring of the mother's first marriage. Accordingly, the presumption arises that the intestate, having been born within the normal period of gestation after the death of her mother's first husband, was the legitimate child of that husband. Where this presumption is applicable the court need not concern itself with the further presumptions arising from the status of the mother at the date of birth and from the statement as to paternity contained in the birth certificate, for they do not arise and can have no application.

A. A. Baden Fuller for the third defendant, representing the maternal relations. A person cannot take under an intestacy unless he proves that he is related to the intestate. On the evidence before the court in the present case the first and second defendants cannot prove that either Rawlings or Sheppard was the father of the intestate. The onus is on the first and second defendants to establish their cases: see the analogous case of proving a title to property dependent on survivorship: *Hickman* v. *Peacey*.[4] On the other hand, it is only necessary for persons claiming on the maternal side to show that the intestate was the legitimate child of her mother. On this question the paternity of the intestate is an irrelevant consideration. It is plain that the intestate's mother was lawfully married both at the time of the intestate's conception and at the time of her birth. Accordingly, she was plainly the legitimate child of her mother, and the persons claiming through her are entitled to the residue of the intestate's estate, to the exclusion of the persons claiming through either Rawlings or Sheppard.

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[2] [1926] Ch. 284.

[3] (1837) 5 Cl. & F. 163, 214–7.

[4] [1945] A.C. 304, 332, 340.

1954

OVERBURY, DECD., *In re.* SHEPPARD *v.* MATTHEWS.

HARMAN J. This is a summons taken out in the course of an inquiry directed in this action to ascertain the persons entitled on the death intestate of Matilda Rawlings Overbury.

[His Lordship stated the facts, and continued:] At the date of the intestate's birth Matilda Sheppard and John Sheppard were husband and wife; the question is whether the child so born, and stated on the birth certificate to be the child of those two, ought to be taken to be their child, or whether she ought to be taken to be the child of Matilda by her first husband, George Rawlings. The inquiry as to her next-of-kin depends upon the answer.

The matter has been argued from three points of view; first I have been pressed to hold that the second husband's relations must take, having regard to the fact that the birth certificate on its face shows the intestate to be the child of John William Sheppard and his wife, and it is added, as evidence that she was the child of John William Sheppard, that she lived her entire life under that name until she married. Her marriage certificate shows her marriage in March, 1901, to Horace Overbury; she is there described as the daughter of John William Sheppard, but her Christian names there, "Minnie Matilda," show that she had dropped the "Rawlings" with which she began life.

The Rawlings relations argue contra that there is a presumption that she was the legitimate child of George Rawlings, to whom her mother was married at a time at which, in the normal course of events, she would have been conceived; and if her mother had not subsequently remarried there would have been no doubt—as I suppose there cannot be—that she would have been considered the legitimate offspring of her mother's first marriage.

Those two presumptions conflict one with the other. A third argument was put forward by Mr. Baden Fuller, who represents the maternal relations; he submitted that I can well conclude that the intestate was a legitimately born child without having to make up my mind as to paternity. It has often been said that a man can never be in any doubt as to who his mother was, but it is always a matter of doubt who was his father. Mr. Baden Fuller submitted that in accordance with English law the onus is on a claimant to prove his case. He contended that if I think that neither of the husbands in this case has been proved to be the father, although the mother was a married woman both at the time of the child's birth and at the time of her conception, I may conclude that the child was legitimate offspring of her mother, and reject the relations of both fathers on the ground that they have not proved their cases.

That argument seems to me to be too ingenious altogether. In my judgment one can only prove a child to be legitimate by proving the marriage of its parents, or by evidence from which the court can infer their marriage: and that involves the identification of the father no less than of the mother. Consequently, it seems to me that I must decide in favour of one or other of these presumptions.

There appears to be no authority on this subject, for in Stephen's Digest of the Law of Evidence (1936), 12th ed., I find this note on p. 133: "I am not aware of any decision as to the "paternity of a child born, say, six months after the death of one "husband, and three months after the mother's marriage to "another husband."

That is precisely the problem which confronts me. In *In re Heath*,[1] Lord Cohen, then a judge of first instance, was in the same position, although he held in a reserved judgment that it was unnecessary to decide that point, for he said, when dealing with counsel's argument: ". . . Mr. Stranders, for the first "defendant, contends, first, that the presumption"—that is, the presumption of legitimacy—"does not apply to posthumous chil-"dren and, secondly, that it is rebuttable and is rebutted in this "case. In my view, his first contention conflicts with the prin-"ciple on which the rule that a father's or mother's declaration is "inadmissible to bastardize the issue born after marriage is based "—see *per* Lord Birkenhead L.C., citing *Goodright* v. *Moss* [2] in "*Russell* v. *Russell* [3]—but it avoids a difficult situation which "might arise where a child was born within nine months after the "first husband's death but after the widow's remarriage. Unless "Mr. Stranders' contention is correct, the presumption of legiti-"macy would, in such a case, make the child the legitimate child "of two fathers. I need not, however, decide whether the pre-"sumption applies. . . ."

With all respect to the judge, I cannot agree with a conclusion which would make a child the legitimate offspring of two fathers; no presumption leads to that result.

There being those two presumptions, which of them ought to prevail? The argument in favour of the first presumption was that, as this child was born within nine months of the dissolution of the first marriage by the father's death, it was the legitimate offspring of that marriage and that, accordingly, it was unnecessary to look any further because the second presumption did not arise. The second presumption is supported by the two certificates which are at least some evidence of their contents: *In re Stollery.*[4] One further piece of evidence is claimed as pointing both ways. This is the fact that the second Christian name given to this child was Rawlings, the surname of the first husband. On the one side it is said that the mother gave her that name because she knew that George Rawlings was the father; on the other, it is suggested that it was a device to conceal the fact that she had a relationship with John William Sheppard before the death of George Rawlings.

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[1] [1945] Ch. 417, 422; 61 T.L.R. 554.

[2] (1777) 2 Cowp. 591, 592, 594.

[3] [1924] A.C. 687, 697; 40 T.L.R. 713.

The mother was a young woman of 21 years of age; she had only been married six months when her husband died, and I am asked to suppose that before the six months were out she had ceased to have any marital relations with her first husband and was cohabiting with a lover in the shape of her second husband. That is a supposition which I cannot accept without any evidence beyond the certificates, that it was so. I see no reason to make any such supposition. It is quite a common thing for a woman to be remarried shortly after her first husband has died, especially when that husband is killed in some accident, as this husband was, and his death leaves her destitute. If she was carrying his child at the time, and the second husband had no objection to marrying her in those circumstances, and if she had the child baptized with the name of her first husband—whose child it was—that seems to me to be entirely in accordance with the natural order of things.

Accordingly, I think that the probabilities point in favour of the first presumption, and that this child ought to be considered, and, indeed, was in the eye of the law, the child of George Rawlings and Matilda his wife, by their marriage on July 4, 1868.

With that expression of opinion, I refer this matter back to the master; the costs will be dealt with on further consideration.

Judgment accordingly.

Solicitors: *Stafford Clark & Co.*

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[4] [1926] Ch. 284; 42 T.L.R. 253.

C. A.

1954
Oct. 27, 28.

Jenkins,
Romer and
Parker L.JJ.

In re HALL'S SETTLEMENT.
SANDERSON AND OTHERS *v.* INLAND REVENUE COMMISSIONERS.

[1954 H. No. 1481.]

Revenue — Estate duty — Valuation — Shares — "Property deemed to "pass"—Shares in company controlled by deceased—Disposition within three years of death—Method of valuation—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2, 7 (5)—*Finance Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 55.

On July 27, 1942, H. voluntarily settled certain shares in a company in which he held a controlling interest on trust for his son and daughter. He died on September 30, 1943. On the question whether for the purposes of estate duty the value of the shares was to be ascertained under section 55 of the Finance Act, 1940, or on an open market basis under section 7 (5) of the Finance Act, 1894:—

Held that, on the true construction of section 55 of the Act of 1940, in the opening words of the section ("Where for the purposes "of estate duty there pass, on the death of a person dying after the "commencement of this Act, shares . . .") the phrase "for the "purposes of estate duty" qualified the words "there pass" and, accordingly, the reference in the section to property passing on a death comprised any kind of passing, actual or notional, which for the purposes of estate duty amounted to a passing which attracted duty and, therefore, the shares were to be valued in accordance with the provisions of section 55.

Earl Cowley v. *Inland Revenue Commissioners* [1899] A.C. 198; 15 T.L.R. 270 and *Attorney-General* v. *Milne* [1914] A.C. 765; 30 T.L.R. 476 considered.

Decision of Upjohn J. ([1954] 1 W.L.R. 1185; [1954] 2 All E.R. 679) affirmed.

APPEAL from Upjohn J.[1]

The deceased, Harold Hall, was the owner of some 2,951 shares in a private limited company in which he had a controlling interest. By a voluntary settlement dated July 27, 1942, the deceased settled 400 of the shares in question on trust for the benefit of his son and daughter. On September 30, 1943, the settlor died and the settled shares became liable to estate duty by virtue of section 2 (1) (*c*) of the Finance Act, 1894.

By this summons the court was asked to determine whether the value of the settled shares was to be ascertained in accordance

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[1] [1954] 1 W.L.R. 1185; [1954] 2 All E.R. 679.

C. A.
1954

HALL'S SETTLEMENT, *In re.* SANDERSON *v.* INLAND REVENUE COMMISSIONERS.

with the provisions of section 55 of the Finance Act, 1940,[2] under which the value had been agreed at £90 10s. a share, or in accordance with section 7 (5) of the Finance Act, 1894,[3] under which the value would be about £22 10s. a share.

Upjohn J. held that the shares must be valued in accordance with the provisions of section 55 of the Act of 1940.

The plaintiffs appealed.

F. N. Bucher and *J. A. Armstrong* for the plaintiffs, trustees of the voluntary settlement. The plaintiffs' case is based on seven propositions. First, in the Finance Acts a reference to the "passing" of property is sometimes a reference to the actual passing of property in the natural sense of changing hands on a death; sometimes the reference includes both an actual passing and a notional passing under section 2 of the Finance Act, 1894, and at other times the reference is only to a notional passing. Secondly, sections which impose liability to duty are divisible into two branches, the first tax property which actually passes on the death, the second tax property which is deemed to pass on the death, although it does not, in fact, pass. Thirdly, in the sections which impose a liability to tax a reference to property "passing" means only an actual passing, and where a notional passing is included express words are used to denote the artificial character of the passing. Fourthly, section 55 of the Finance Act, 1940, although a valuation section, is mandatory and is aimed at imposing an additional liability to duty and, accordingly, the word "pass" in that section should not be enlarged to include a notional passing, unless the context compels a wider meaning. Fifthly, for the primary purpose of imposing estate duty the word "pass" means an actual passing, and the opening phrase of section 55 " where for the purposes of estate duty " which precedes the word " pass " should not be construed as extending the meaning of the word " pass " in that section to include a notional passing. Sixthly, in section 55 the words " for the purposes of " estate duty " are an echo of the same words in section 37 of the Finance Act, 1930 (which was repealed and replaced by section 55), where they are not attached to the word " pass," and it follows that the word " pass " should not be enlarged by the use of these words in section 55. Seventhly, an enlarged meaning of the word " pass " cannot be justified by a consideration of the purpose of the section; the subject cannot be made liable to tax unless the liability is imposed by clear words.

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[2] Finance Act, 1940, s. 55 (1): "Where for the purposes of estate "duty there pass, on the death of a "person dying after the commencement of this Act, shares in or "debentures of a company to which "this section applies, then if—(*a*) the "deceased had the control of the "company at any time during the "three years ending with his death "... the principal value of the "shares or debentures, in lieu of "being estimated in accordance with "the provisions of subsection (5) of "section 7 of the Finance Act, 1894, "shall be estimated by reference to "the net value of the assets of the "company in accordance with the "provisions of the next succeeding "subsection."

S. 65: "... Part IV of this Act" [which contains sections 55 and 57] "shall be construed as one with "Part I of the Finance Act, 1894."

[3] Finance Act, 1894, s. 7 (5): "The principal value of any property "shall be estimated to be the price "which, in the opinion of the Commissioners, such property would "fetch if sold in the open market "at the time of the death of the "deceased."

The plaintiffs contend that the judge did not give effect to the principle laid down in *Earl Cowley* v. *Inland Revenue Commissioners*,[4] where the distinction between property passing under section 1 of the Finance Act, 1894, and property deemed to pass under section 2 of that Act is clearly stated. That case shows that the word " pass " only applies to an actual passing. The only sections in the Finance Acts in which the word " pass " refers both to an actual and to a notional passing are sections granting reliefs, machinery sections and sections which would not make sense if the extended meaning were not given to the word. Section 37 of the Act of 1930 could not be construed so as to extend to a notional passing. It cannot have been intended by Parliament when section 55 was passed to impose a new liability to duty. A strict construction of section 55 should be adopted. The difficulty arises, if the Crown is right, that the subject would be taxed without any right of access to the property on which tax is assessed. Only the Crown has a right under sections 46, 50 and 57 of the Act of 1940 to the information as to the assets of the company on which duty is assessed. The plaintiffs have no right to obtain such information. [Reference was made to *Attorney-General* v. *Milne*.[5]] In construing section 55 of the Act of 1940 the provisions of section 30 of the Finance Act, 1954, are not relevant.

J. A. Armstrong following. The words " for the purposes of " estate duty " are in themselves neutral. They could have been inserted in section 55 with the intention of giving to the word " pass " a wider meaning, equally they could have been inserted with the intention of confining section 55 to shares which actually pass. If there is any ambiguity it must be resolved in favour of the tax-payer: *St. Aubyn* v. *Attorney-General* [6]; *Attorney-General* v. *Earl of Selborne.*[7] Secondly, the construction which the Crown seeks to give to this section might in some cases result in great hardship to the tax-payer. That is a relevant consideration if the section is ambiguous. The plaintiffs, if the Crown is right, could not sell these shares on the basis of their open market value. They have only a minority holding. They might have to sell their entire holding to meet the claim of the Crown.

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[4] [1899] A.C. 198; 15 T.L.R. 270.

[5] [1913] 2 K.B. 606; [1914] A.C. 765; 30 T.L.R. 476.

B. L. Bathurst Q.C. and *J. H. Stamp* for the Crown. This appeal involves the fundamental question as to the nature of estate duty. The Crown is prepared to argue that their claim would succeed as well on the wording of section 37 of the Act of 1930, the section on which section 55 is founded, as on the wording of section 55 of the Act of 1940. In section 2 of the Act of 1894 the words are not " deemed to pass " but " deemed to " include." What section 2 does is to bring into charge all property falling within section 2. It cannot be suggested that section 4 does not include in the charge all section 2 property. Section 5 of the Act of 1894 is concerned with a different duty. It has never been suggested that section 7 (4) does not include section 2 property. If section 7 did not apply to such property, the Act of 1894 could not work. Sections 1 and 2 of that Act must be read together. There are not two duties but only one duty. Section 55 of the Act of 1940 does not impose a new duty. It merely substitutes a new method of valuation for the old. *Attorney-General* v. *Milne* [8] was a decision on section 5 of the Act of 1894 and is not an authority in this case. [Reference was made to *Lord Strathcona* v. *Inland Revenue Commissioners.*[9]]

With regard to the question of hardship: generally where section 55 applies the deceased had knowledge of the affairs of the company in question. If within five years of a gift of shares in a private company the donee sells them and the donor dies, the shares have to be valued as at the date of his death. The Revenue has power to find out the value of the shares for the purposes of section 55. Powers of this nature have been in operation since 1894: see section 7 (8) of that Act. When the word " pass " is used in the Finance Act, 1894, and indeed in subsequent Finance Acts, unless a new duty is being imposed it

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[6] [1952] A.C. 15; [1951] 2 All E.R. 473.

[7] [1902] 1 K.B. 388; 18 T.L.R. 111.

[8] [1914] A.C. 765.

[9] 1929 S.C. 800.

C. A.

1954

HALL'S SETTLEMENT, *In re.* SANDERSON v. INLAND REVENUE COMMISSIONERS.

includes property deemed to pass. The words "for the purposes "of estate duty" can only mean that property deemed to pass is included in section 55 (2) (*a*). If there is any ambiguity in section 55 the court is entitled to look at the meaning Parliament put on that section in section 30 (1) of the Finance Act, 1954. [Reference was made to *Ormond Investment Co. Ld.* v. *Betts*[10] and *Camille and Henry Dreyfus Foundation Inc.* v. *Inland Revenue Commissioners.*[11]] It appears from a consideration of the Finance Act, 1894, and of the subsequent Finance Acts that the draftsmen have not been consistent in their use of the word "pass." On occasions the words "are deemed to pass" have been added ex abundante cautela.

J. H. Stamp following. The same liability to duty arises whether section 1 or 2 of the Act of 1894 applies. It is illogical to try to attach different incidence of charge to the two classes of property. The statement that sections 1 and 2 are mutually exclusive must be understood in a limited sense. Section 2 imposes no charge. The only charge is in section 1. Section 2 property is caught by section 1. Section 1 and section 2 property do not part company in the Act. Section 55 of the Act of 1940 is only concerned with valuation. It does not bring any new subject-matter into charge. The shares are charged already. The question is how they are to be valued. There is no justification for a different method of valuation in the case of section 1 and section 2 property.

F. N. Bucher, in reply, referred to *Attorney-General* v. *Milne*[12] and *Russell* (*Inspector of Taxes*) v. *Scott.*[13]

JENKINS L.J. stated the facts and continued: It is not in dispute that the company is one to which the provisions of section 55 of the Finance Act, 1940, apply, that section being one which substitutes, in respect of shares or debentures of companies in certain cases, a special, and usually more onerous, method of valuation for the common method of valuation by reference to market value prescribed by section 7 (5) of the Act of 1894.

The plaintiffs, as trustees of the voluntary settlement, claim that the 400 shares held by them are, by reason of the gift inter vivos in 1942, not subject to the special provisions of section 55 of the Act of 1940, but should be valued in the ordinary way by reference to their market value.

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[10] [1928] A.C. 143; 13 Tax C. 400.

[11] [1954] Ch. 672; [1954] 2 All E.R. 466.

[12] [1913] 2 K.B. 606.

[13] [1948] A.C. 422; [1948] 2 All E.R. 1.

I will refer briefly to some of the provisions of the Finance Act, 1894. Section 1 contains the grant of estate duty: "In "the case of every person dying after the commencement of "this Part of this Act, there shall, save as herein-after expressly "provided, be levied and paid, upon the principal value ascer-"tained as herein-after provided of all property, real or personal, "settled or not settled, which passes on the death of such person "a duty, called 'Estate Duty,' at the graduated rates herein-"after mentioned. . . ." Section 2 provides that: "(1) Property "passing on the death of the deceased shall be deemed to include "the property following, that is to say," and then there is the well-known list of items, including in particular subparagraph (*c*) of subsection (1) of section 2, which brings in, among other things, gifts inter vivos made (as the law stood at the relevant date) within three years of the death.

The common method of valuation prescribed by section 7 (5) is this: "The principal value of any property shall be estimated "to be the price which, in the opinion of the Commissioners, "such property would fetch if sold in the open market at the "time of the death of the deceased"; and that is the method of valuation which the trustees say is the right one in the present case.

It is maintained on behalf of the Crown that the method of valuation prescribed by section 55 of the Act of 1940 is the appropriate one. That section, so far as material for the present purpose, provides as follows: There is a sidenote: "Valuation "for estate duty of shares and debentures of certain companies," and the section itself reads thus: "(1) Where for the purposes "of estate duty there pass, on the death of a person dying after "the commencement of this Act, shares in or debentures of a "company to which this section applies, then if—(*a*) the deceased "had the control of the company at any time during the three "years ending with his death; or" if certain other conditions apply, "the principal value of the shares or debentures, in lieu "of being estimated in accordance with the provisions of sub-"section (5) of section 7 of the Finance Act, 1894, shall be "estimated by reference to the net value of the assets of the "company in accordance with the provisions of the next "succeeding subsection."

Those are the two alternative methods of valuation, section 7 (5) of the Act of 1894 and section 55 of the Act of 1940; and the question for this court is whether Upjohn J. was right in holding that the appropriate method of valuation was the method prescribed in section 55.

It will be seen that the opening words of section 55 (1) are: "Where for the purposes of estate duty there pass, on the death "of a person dying after the commencement of this Act, shares "in or debentures of a company to which this section applies." Accordingly, the applicability of section 55 depends essentially on there having been a passing, on the death of a person dying after the commencement of the Act, of such shares or debentures. Mr. Bucher, for the trustees, contends that this condition was not fulfilled here. He says that the words "where there pass "on the death of a person" mean "where there actually pass "on the death of a person"; that is to say, where there is a passing under the provisions of section 1 of the Act of 1894. He claims that there is no warrant for extending these words so as to include what is commonly called a notional passing—that is to say, a passing of property which is only deemed to pass by virtue of the provisions of section 2 and does not actually pass within the meaning of section 1.

That submission involves a return to a basic principle, which can be put quite shortly. As has long been settled by *Earl Cowley* v. *Inland Revenue Commissioners*,[1] and in particular the well-known speech of Lord Macnaghten in that case, as explained in *Attorney-General* v. *Milne*,[2] and in particular by the speech of Lord Haldane L.C.,[3] the relationship of section 1 and section 2 of the Act of 1894 is of this nature. Section 2 is not a definition section; it is a provision which enlarges the ambit of the charge imposed by section 1; but once property has been brought within that ambit by the application of one of the conditions mentioned in section 2, then it is in the same case for the purposes of estate duty as property which passes by virtue of section 1 alone.

That is broadly the principle, and the consequences of it, for the purpose of the present case, are these: Mr. Bucher's argument cannot be met simply by treating the words "passing "on the death," wherever they occur, as words by definition including property deemed to pass on the death, for section 2, as I have said, is not a definition section. On the other hand, once property, by virtue of its falling within the mischief of section 2 becomes subject to the charge imposed by section 1, then it is in precisely the same case as the section 1 property for all the purposes of the Finance Act, 1894, and subsequent enactments relating to estate duty. It seems to follow that wherever there are references to property passing on a death in provisions relating to the valuation of property for estate duty purposes, the assessment of the duty payable, and the accountability for it, references in any provisions of that sort to property passing on a death are to be taken as including property deemed to pass on a death, not because the expression "property passing "on a death" is defined by section 2, but because, inasmuch as the section 2 property is subject to precisely the same liability to estate duty as section 1 property, that which is enacted in relation to property passing on a death applies equally to property which is deemed to pass.

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[1] [1899] A.C. 198; 15 T.L.R. 270.
[2] [1914] A.C. 765; 30 T.L.R. 476.
[3] [1914] A.C. 765, 769.

But it follows also that it can, in general, only be right to construe references to property passing on a death as including property deemed to pass, where the subject-matter of the particular enactment in which the phrase appears is in truth an enactment concerning estate duty as charged by section 1 of the Act of 1894 and nothing else; that is to say, dealing with valuation and calculation of rates and accountability, and so forth, with respect to estate duty as charged by section 1, and nothing else. If a new tax or a new and distinct liability of some sort was introduced and it was expressed to apply to property "passing" on a death simpliciter, then, even though such a section was incorporated in the general body of estate duty legislation, it might very well be that the court would hold in such a case that the expression "property passing on a death" must be given its primary and narrow meaning, there being no words to show that anything else but property actually "passing" on a death was to be subject to such new charge.

That principle is illustrated by the speech of Lord Haldane L.C. in *Attorney-General* v. *Milne*,[4] which is one of the cases relied on by Mr. Bucher. The question there was whether settlement estate duty was payable. Settlement estate duty was imposed by section 5 (1) of the Act in these terms: "'Where "'property in respect of which estate duty is leviable, is settled "'by the will of the deceased, or having been settled by some "'other disposition passes under that disposition on the death "'of the deceased to some person not competent to dispose of "'the property' a further estate duty (called settlement estate

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[4] [1914] A.C. 765.

C. A.

1954

HALL'S SETTLEMENT, *In re.* SANDERSON *v.* INLAND REVENUE COMMISSIONERS.

Jenkins L.J.

" duty) on the principal value of the settled property shall be " levied "; and the point at issue in *Attorney-General* v. *Milne*[4] was whether property, notionally passing on the death of the deceased by reason of his death within three years of a voluntary settlement, answered the description of property passing " under " that disposition on the death of the deceased," and so attracted settlement estate duty. Lord Haldane L.C. said[5]: " The answer " to this question depends mainly on the interpretation to be " placed on four sections of the Finance Act, 1894. By section 1 " estate duty is to be levied upon the principal value of property, " settled or unsettled, which passes on death. By section 2 " ' property passing on the death of the deceased shall be deemed " ' to include ' certain specified cases of property which does not " actually pass on death, like the property to which section 1 " relates. The meaning of section 2 was discussed in this House " in *Earl Cowley* v. *Inland Revenue Commissioners*,[6] and was " explained to be that the section was not a definition of the " field of section 1, but was framed for the purpose of rendering " liable to taxation certain kinds of property that do not actually " pass on death, but are sufficiently analogous to property so " passing as to make it proper to tax them. Section 2 is thus " not a definition section, but an independent section operating " outside the field of section 1 "; and his Lordship said[7]: " My " Lords, for reasons already indicated, I have, after considera- " tion, come to the conclusion that section 2 cannot properly be " read as extending the category of a notional passing on death " beyond what is requisite for the special purpose of bringing " certain cases within section 1 in order to impose the particular " tax which section 1 levies."

Then Lord Haldane L.C. added that the duty imposed by section 5 was a new and quite different duty, and, at the end of his speech said[8]: " The only legitimate consideration that " could justify a different interpretation would be one which " resulted from section 2 being read as defining what was meant " by ' passing on death ' throughout the Act. A close examina- " tion of the structure of the Act has satisfied me that this " section lays down no such general canon of construction, but " is confined in its operation to the limited function of adding " to the cases in which the duty enacted by section 1 is imposed.

[4] [1914] A.C. 765.

[5] Ibid. 769.

[6] [1899] A.C. 198.

[7] [1914] A.C. 767, 770.

[8] Ibid. 771.

"In other words, section 2 has no reference to the settlement "estate duty which section 5 imposes as a new and separate "duty."

To my mind, therefore, the question raised by Mr. Bucher's argument in this case is whether section 55 should properly be regarded merely as a new valuation section applying a new and special method of valuation to property of a specified description, or whether it should be regarded as amounting to a completely new departure in estate duty legislation, which imposes something in the nature of a new liability. That is a question which is by no means free from difficulty. As at present advised, I incline to the view that section 55 should be regarded simply as a valuation section. The method of valuation therein prescribed is to take the place of the ordinary method in the case of any shares or debentures to which the section applies. It provides: The "value of the shares or debentures, in lieu of being estimated "in accordance with the provisions of subsection (5) of section 7 "of the Finance Act, 1894, shall be estimated," and so on, prescribing the new method of valuation. It is thus in terms substituted for an existing method which applies equally to property notionally passing and to property actually passing. On the other hand, the section does make a radically new departure from anything contemplated by the Act of 1894. It applies only to a particular kind of property, that is to say, shares and debentures; and, furthermore, it discriminates between the holders of property of that kind by reference to their relationship to the company in which the shares or debentures are held. Accordingly, while I incline to the view that this case could be disposed of in favour of the Crown simply by saying that this is a mere valuation provision, so that references in it to property passing on a death must, on the general principle which I have endeavoured to state, be treated, in effect, as including property deemed to pass, the novelty of the provision does lead me to feel some doubt about that matter. But the decisive feature in section 55 consists in the opening words "Where for the purposes "of estate duty there pass, on the death of a person dying after "the commencement of this Act," . . . The words "for the pur-"poses of estate duty" qualifying, as they do, the words "there "pass," seem to make it reasonably plain that the reference in this section to property passing on a death comprises any kind of passing, actual or notional, which, for the purposes of estate duty, amounts to a passing that attracts duty. Accordingly, while I would be disposed to treat this as a pure valuation section, I prefer to refrain from forming any concluded opinion on that point, for I think the section is, on its true construction, expressed in terms applicable to notional passing as well as to actual passing.

We have had the assistance of a full and careful argument on both sides. On the side of the Crown we were referred to a number of sections in the Finance Acts in which the expression "property passing on a death" must necessarily be held to include "property deemed to pass." On the other hand, Mr. Bucher referred us to a number of sections, and in particular to some of the provisions in the Finance Act, 1930, as well as to other provisions in the Act of 1940, in which a distinction had been drawn in express terms between actual and notional passing. I think it probable that many other examples either way could be found up and down the Acts, and it is unlikely that anyone could spell out of the practice of successive draftsmen as regards references to "passing" and to "notional passing" any completely logical system. But, the case does not really turn on those arguments, but turns in the end on the construction of section 55, and, taking the view which I have endeavoured to express about the construction of that section by reason of the import of its opening words, I think that the judge came to a right conclusion in this case, and, accordingly, I would dismiss this appeal.

ROMER L.J. I agree, and I am content to adopt in its entirety the judgment which my Lord has just delivered.

PARKER L.J. I agree, and have nothing to add.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Peacock & Goddard for Sanderson & Co., Hull; Solicitor of Inland Revenue.*

B. A. B.

MOUSLEY *v.* RIGBY.

1954
Nov. 2, 16.

Roxburgh J.

[1871 M. No. 214.]

Will—Construction—Substitutionary gift—Gift to issue of stirps after life interest—Issue required to survive date of distribution.

A testator devised and bequeathed a half share in his residuary estate after the death of the tenant for life to J. R., and in case he (J. R.) should be then dead, the testator devised and bequeathed J. R.'s share "unto and equally between all his . . . children "who shall be then living and the issue of such of them as shall "be then dead leaving issue in equal shares . . . but such issue "to take only amongst them in equal shares the share or shares "his or their parent or parents would have been entitled to if "living . . ."

J. R. predeceased the tenant for life; he (J. R.) had four children who had died leaving issue; and his share was accordingly divisible into four stirpital shares. It was conceded that "issue" was not restricted to the children of J. R.'s children.

On the question whether the issue of a head of a stirps (who had died) must survive the tenant for life in order to participate in the distribution of residue:—

Held, that only issue who survived the tenant for life could participate in the share bequeathed to J. R. and his issue.

In re Embury (1913) 109 L.T. 511 followed.

Martin v. *Holgate* (1866) L.R. 1 H.L. 175 distinguished; *In re Orton's Trust* (1866) L.R. 3 Eq. 375 not followed.

PETITION.

The court was asked by this petition to order the payment out of funds in court, which had been paid into court pursuant to an order of Romilly M.R. of April 16, 1872, in an administration action arising out of the will, dated February 7, 1863, of the Reverend William Mousley, who had died on September 12, 1871. The funds had now become distributable on the death on January 29, 1945, of the tenant for life, the testator's granddaughter, Elizabeth Lucy Morris Mousley.

The testator by his will devised and bequeathed his residuary estate, in case (as happened) his granddaughter Elizabeth should die without issue, subject to the granddaughter's life interest, to Samuel Rigby and James Rigby in equal shares, and in case they or either of them should be then dead (in fact both were then dead), he devised and bequeathed the share of him or them so dying "unto and equally between all his or their children who "shall be then living and the issue of such of them as shall be "then dead leaving issue in equal shares as tenants in common "and not as joint tenants but such issue to take only amongst "them in equal shares the share or shares his or their parent "or parents would have been entitled to if living. . . ." No question arose as to Samuel Rigby's moiety.

When the testator's granddaughter Elizabeth died all the five children of James Rigby were already dead. Four of them had died leaving issue, namely, (1) Mrs. Sammons, (2) James Augustus Rigby, (3) Samuel Claudius Rigby, and (4) William Reginald Rigby. James Rigby's moiety was accordingly divisible into four stirpital shares, each of his four children being the founder of a stirps.

The question on the petition relevant to this report was whether the issue of a stirps (who was dead at the date of distribution) must survive that date in order to participate in the distribution of residue. It had been conceded that "issue" of a stirps was not restricted to children.

T. A. C. Burgess for the petitioners.

R. S. Lazarus for the respondent Woolbridge, a trustee of the will. The issue who take should not be confined to issue who survived the date of distribution; it was held in *Martin* v. *Holgate* [1] that the interest of children who took in substitution for their parents was not defeated if they did not survive the tenant for life. Similarly in *In re Woolley* [2] it was held that great-grandchildren who took in substitution for grandchildren (their parents) did not lose their interest if they died before the date of distribution, the date of the death of the tenant for life.

Those cases are distinguishable from the present case in that the substitutional gift was restricted to children, but in *In re Orton's Trust*,[3] where issue was not restricted to children, the decision in *Martin* v. *Holgate* [4] was followed. *In re Orton's Trust* [5] is on all fours with the present case. It is conceded that it is not possible to distinguish *In re Orton's Trust* [5] from *In re Embury*,[6] where Sargant J. held that for issue to take in substitution for their parents the issue must survive the tenant for life; but it was held in *Martin* v. *Holgate* [7] that the interests of issue were vested subject to divesting, and that is so in the present case. On the authority of *Martin* v. *Holgate*[7] and of *In re Orton's Trust*[8] it should not be necessary for issue to survive the tenant for life in order to take.

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[1] (1866) L.R. 1 H.L. 175.
[2] [1903] 2 Ch. 206.
[3] (1866) L.R. 3 Eq. 375.
[4] L.R. 1 H.L. 175.
[5] L.R. 3 Eq. 375.
[6] (1913) 109 L.T. 511.
[7] L.R. 1 H.L. 175.

E. M. Winterbotham for the respondent Mrs. Kathleen Creamer, a great-granddaughter of James Rigby. In *Sibley* v. *Perry*[9] " issue " was held to mean children, and it is clear on the authorities that when children are substituted for their parents they take the gift as an original gift and do not need to survive the period of distribution: see *Martin* v. *Holgate.*[10]

It is admitted that if there is a true substitutional gift the substituted persons must prima facie survive the one for whom they are substituted. That rule does not apply where the gift is original. In neither of those cases do the substituted persons have to survive the tenant for life. Those are rules of construction, and there has been established a rule that where the class to be substituted is a class of issue and there is a provision that a member of the class shall not take in competition with the parent, there is then an exception, and the gift is in all degrees contingent on surviving the tenant for life.

Martin v. *Holgate*[10] is distinguishable from the present case because the gift there was limited to children who immediately took a vested interest on the death of their parent or parents; but where, as here, issue is not limited to children, then their interests are contingent on surviving the tenant for life, because until then it cannot be known which generation will take in substitution for the original stirps. *In re Orton's Trust*[11] was wrongly held to be indistinguishable from *Martin* v. *Holgate*,[12] since in the former case issue was not limited to children. In *In re Embury*[13] issue was not restricted to children, and it was held that the gift to issue was contingent and that it was necessary to survive the date of distribution. That case should be followed rather than *In re Orton's Trust.*[14] [Reference was also made to *In re Langlands*[15] and Theobald on Wills, 11th ed., pp. 572–4.]

Cur. adv. vult.

November 16. ROXBURGH J., having stated the facts, read the following judgment: The first question is (or might have been) whether " issue " of a stirps is restricted to " children " of a stirps by the context. But it has been conceded that it is not; and I regard this as a vital factor in the solution of the second question, which is whether a grandchild of James, that is to say, a child of the head of a stirps, who predeceased Elizabeth can participate in the distribution of residue.

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[7] L.R. 1 H.L. 175.
[8] L.R. 3 Eq. 375.
[9] (1802) 7 Ves. 522.
[10] L.R. 1 H.L. 175.
[11] L.R. 3 Eq. 375.
[12] L.R. 1 H.L. 175.
[13] 109 L.T. 511.
[14] L.R. 3 Eq. 375.
[15] (1917) 87 L.J.Ch. 1.

It was conceded (and this was decided by *Martin* v. *Holgate* [1]) that, where children of a stirps are alone concerned, a direction that if the founder of the stirps should be dead at a given time leaving issue the issue (that is to say, the children) should take the share which their parent would have taken if then living does not involve an implication that the children must be living at the date of distribution. But this is because the gift to the children is construed as " an original gift " (*per* Lord Chelmsford [2]) or " an independent bequest " (*per* Lord Westbury [2]) under which the children of the founder of a stirps who predeceased the tenant for life take " an immediate vested interest " although the amount of the share is uncertain until the death of the tenant for life.

But this interpretation is inappropriate where " issue " is not restricted to " children," because there may be substitutions not only of a child for the founder of the stirps (which has been held to be an original or independent gift) but of remoter issue for a child. It seems impossible to doubt that the substitution of the remoter issue for the child must be at the date of the death of the tenant for life—the remoter issue take the share which their parent would have taken if then living—and this must be a contingent gift to the remoter issue, and it would be difficult in these circumstances to regard the gift to the children of the founder of the stirps as not subject to the same contingency of surviving the tenant for life.

The difference between the two cases did not occur to Malins V.-C. in *In re Orton's Trust*,[3] because although he was concerned with issue more remote than children he felt obliged to reach the same conclusion as that in *Martin* v. *Holgate*.[4]

In re Orton's Trust [5] is, in my view, indistinguishable from the present case, and if it had stood alone I might have felt bound to follow it. However, Sargant J. in *In re Embury* [6] (not embarrassed by *In re Orton's Trust* [7] because it was not cited to him) said this [8]: " If the gift had been confined to children

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[1] (1866) L.R. 1 H.L. 175.

[2] Ibid. 186, 188.

[3] (1866) L.R. 3 Eq. 375, 380.

[4] L.R. 1 H.L. 175.

[5] L.R. 3 Eq. 375.

[6] (1913) 109 L.T. 511.

[7] L.R. 3 Eq. 375.

[8] 109 L.T. 514.

"the contingency would not be imported into the gift over: "(*Martin* v. *Holgate* [9]). But since I have construed the word "'issue' in its ordinary sense it follows that the gift to issue "must be construed as a contingent gift and not as a vested "gift." Accordingly, he reached a decision which is admittedly in conflict with *In re Orton's Trust.*[10]

Between these two conflicting decisions I prefer that of Sargant J. in *In re Embury* [11] for the reasons which I have attempted to give. The result is that no issue can take unless he or she survived Elizabeth. This conclusion certainly seems to accord with the good sense of the matter. I will declare that the funds in court are divisible in equal shares per stirpes among such grandchildren of James Rigby as survived the testator's granddaughter Elizabeth Lucy Morris Mousley who died on January 29, 1945, and the children living at her death of any such grandchildren who predeceased her.

Declaration accordingly.

Solicitors: *Kingsford, Dorman & Co. for W. F. & W. Willoughby, Daventry.*

I. G. R. M.

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[9] L.R. 1 H.L. 175.

[10] L.R. 3 Eq. 375.

[11] 109 L.T. 511.

In re HARTLEY BAIRD LD.

[No. 00828 of 1954.]

1954
Nov. 29.

Wynn-Parry J.

Company—Meeting—Quorum—Quorum present at beginning of meeting —Departure of member from meeting after business begun—Quorum not present when resolution passed—Validity of resolution.

Article 52 of a company's articles of association provided: "No "business shall be transacted at any general meeting unless a "quorum is present when the meeting proceeds to business. . . ."

The condition of article 52 is sufficiently complied with if there is a quorum present at the beginning of the meeting when it proceeds to business, and the subsequent departure of a member reducing the meeting below the number required for a quorum does not invalidate the proceedings of the meeting after his departure.

The quorum required by the company's articles for a meeting to alter the rights of a class of shareholders was present at the beginning of the meeting and when it proceeded to consider the business for which it was called, but it was reduced below the number required for a quorum before the vote was taken on the resolution because one member, who was opposed to the resolution, left the meeting before the vote was taken:—

Held, that article 52 had been complied with and the resolution passed was a valid class resolution.

Dictum in *Henderson* v. *James Louttit & Co. Ld.* (1894) 21 Rettie 674 not followed.

PETITION.

At an extraordinary general meeting of Hartley Baird Ld. held on July 29, 1954, a resolution was passed for the reduction of the company's capital, which affected the rights of the " A " and " B " ordinary shareholders. At separate meetings of the " A " and " B " ordinary shareholders extraordinary resolutions were passed pursuant to article 46 of the company's articles of association agreeing to the proposed reduction. No question arose with regard to the meeting of the " A " ordinary shareholders; but at the meeting of the " B " ordinary shareholders a quorum as required by article 46 was present at the beginning of the meeting, but one shareholder, who at that time objected to the proposed reduction, left the meeting after it had proceeded to consider the business for which it had been called, thus reducing the number present to a number below the quorum required by article 46 before the resolution was passed.

The court was asked, on this petition to confirm the proposed reduction of capital, to decide as a preliminary point whether as a result of that act no valid resolution was passed at the meeting.

Article 46 of the company's articles of association provided: " . . . all or any of the conditions . . . attached . . . to any class " of shares . . . may from time to time be modified, varied, " extended or surrendered in any manner with the consent in " writing of the holders of not less than three-quarters of the " issued shares of that class or with the sanction of an extra- " ordinary resolution passed at a separate meeting of the members " of that class. To any such separate meeting all the provisions " of these articles as to general meetings of the company . . . " shall mutatis mutandis apply, but so that the necessary quorum " shall be members of the class holding or representing by proxy " one-third of the capital paid or credited as paid on the issued " shares of the class. . . ."

Article 52 provided: "No business shall be transacted at any "general meeting unless a quorum is present when the meeting "proceeds to business. For all purposes the quorum shall be "ten members personally present."

Article 53: "If within half an hour from the time appointed "for the holding of a general meeting a quorum is not present, "the meeting, if convened on the requisition of members, shall "be dissolved. In any other case it shall stand adjourned to "the same day in the next week, at the same time and place, "and if at such adjourned meeting a quorum is not present within "half an hour from the time appointed for holding the meeting, "the members present shall be a quorum."

There was no opposition to the petition.

Charles Russell Q.C. and *Kenneth Mackinnon* for the company. Article 52 requires a quorum to be present when a meeting proceeds to business, and that was so at the meeting of the "B" ordinary shareholders; there was therefore a sufficient compliance with the article. Articles 52 and 53 fit together and show what is the proper construction of article 52; article 52 provides that a quorum must be present when the meeting proceeds to business, and article 53 contains provisions for getting out of an impasse when no quorum is present at all. The articles contain no provision for the case where a quorum is present at the beginning of the meeting when the meeting proceeds to business, but it is reduced below that quorum because someone leaves the meeting before the business is transacted. To imply a provision that a quorum must be present when the business is transacted would fail to give proper effect to the words "when the meeting proceeds "to business," and would give rise to an absurd situation, because it would enable a person to wreck a meeting where a quorum was present at the beginning of the meeting by leaving before the business of the meeting was transacted and thereby reducing the meeting to a number below a quorum. In those circumstances the meeting would not be saved by article 53.

In the Scottish case of *Henderson* v. *James Louttit & Co. Ld.*,[1] where an article similar to article 52 was considered, there is a dictum to the opposite effect. That was a petition for the voluntary winding up of a company by the court, and was rather more concerned with the point whether certain members were effective members for the purpose of a quorum. The present point was not really argued and there was not before the court an article similar to article 53 of the present articles. That dictum should in the circumstances be regarded as obiter and not be followed.

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[1] (1894) 21 Rettie 674.

WYNN-PARRY J., after stating the facts: In the interpretation of such a commercial document as articles of association, the maxim ut res magis valeat quam pereat should certainly be applied, and I propose to interpret these articles in the light of that maxim. The language of article 52, on the face of it, is quite clear. It provides that no business is to be transacted at a general meeting unless a condition is fulfilled, and that condition is a composite one. It requires not only that a quorum is to be present, but qualifies that by saying that the quorum is to be present when the meeting proceeds to business, then a formula is set out for calculating the number who are to form the quorum. It could only be by implication that that language could be extended to cover the position when the meeting proceeds to the vote because, on the face of it, the condition of the article is fulfilled if the quorum is present when the meeting proceeds to consider the business for which it was convened.

Looking still only at these articles, I think that that interpretation is underlined when one considers and analyses article 53, which is designed to cover the position which would arise if a quorum was not at any time present, and not merely where the numbers present were reduced below the number required for a quorum under article 52, because article 53 says: "If within "half an hour from the time appointed for the holding of a "general meeting a quorum is not present," then certain consequences are to follow. Putting aside the case of a meeting convened on the requisition of members, the result would be that there would be an automatic adjournment for one week, and then the members present would form a quorum. That article is clearly designed to save a meeting which has been properly convened, but which cannot proceed to business because no quorum is ever present; but it does not apply in the case of a meeting at which a quorum is present at the beginning when the meeting proceeds to business, but at which a quorum has ceased to be present at the time when the meeting proceeds to vote on any resolution before it.

Either then there is a gap in the scheme of the articles, which would be unfortunate. or else there is no gap; but there can be no gap only if the interpretation which I have placed on article 52 is the right one. I should myself have felt no doubt whatsoever on the matter but for *Henderson* v. *James Louttit & Co. Ld.*,[1] where the court had to consider a petition for the winding-up of the company under the supervision of the court. In the course of that case, the court had to consider an article in all material respects similar to article 52, but so far as I can see from a study of the report, the article corresponding to article 53 in the company's articles in this case was not cited to the court, nor was the argument put before me by Mr. Russell in any way adumbrated.

The Lord President took the view, in which the other two members of the court concurred, that a quorum must not only be present at the commencement of the meeting, but also at the time when the business was transacted. In the course of the judgment he said[2]: "It would be a highly inconvenient, not to "say unnatural meaning to attribute to it, [the article] to hold "that all that is necessary to the validity of the proceedings is, "that at the earliest stage of the meeting a quorum should be "present, but that after the real business of the meeting is "started and under consideration the quorum might go away."

Prima facie those words are apt to apply to the case before me, but as I read the somewhat short report and look at the facts, it appears to me that that statement can be properly regarded as obiter dictum. In any event, with all respect to that decision of the Court of Session, I feel compelled primarily to concentrate on the language of the two relevant articles before me. From the force of that language, I have come to the conclusion that I ought not to follow the Scottish case, but that I ought to conclude that the meeting in question of the holders of the "B" ordinary shares was one at which a valid class resolution was passed, because at the beginning of the meeting, that is, when the meeting proceeded to business, there was present a quorum as provided by article 46 of the articles of association.

His Lordship then heard the petition on its merits.

Reduction of capital confirmed.

Solicitors: *Frere, Cholmeley & Nicholsons.*

I. G. R. M.

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[1] (1894) 21 Rettie 674.

[2] Ibid. 676.

1954
Dec. 7, 14.

Wynn-Parry J.

In re RUSSIAN COMMERCIAL AND INDUSTRIAL BANK.

[No. 0060 of 1922.]

Company—Winding-up—Foreign corporation—Russian bank dissolved in country of origin—Debt owing in roubles to customer on current account—Subsequent winding-up of bank in England—Proof lodged by customer—Date for conversion of debt into sterling.

Conflict of Laws—Debt—Foreign debt—Conversion into sterling. Banking—Current account—Dissolution of bank—Effect.

A bank incorporated in Russia, which also carried on business at an English branch, was dissolved under Russian law in December, 1917, or January, 1918. The English branch continued for a time to carry on banking business. A petition for the compulsory winding-up of the bank was presented in February, 1922, and a compulsory order was made in the following October.

A customer, who at all material times had a credit balance on current account of 36,430 roubles with the English branch, sought to prove in the winding-up for a sum in sterling converted at the rate of exchange current at the date of the dissolution of the bank in Russia. The liquidator, the official receiver, contended that the proper date for conversion was that of the winding-up in England. On the hearing of a summons taken out for the determination of this question:—

Held, (1) that the correct date for the conversion of the rouble debt into sterling was the date on which it became due: *In re British American Continental Bank Ld.* [1922] 2 Ch. 575; 38 T.L.R. 785, and *Madeleine Vionnet et Cie.* v. *Wills* [1940] 1 K.B. 72; 56 T.L.R. 15; [1939] 4 All E.R. 136 followed; statement in Dicey's Conflict of Laws, 6th ed., at p. 745 disapproved;

(2) that, in general, the relationship of banker and customer ceased and the debt became payable at the date of the dissolution of the bank in Russia: *Joachimson* v. *Swiss Bank Corporation* [1921] 3 K.B. 110; 37 T.L.R. 534 considered; but

(3) that for the purposes of the distribution of assets among the creditors in a winding-up in England under the Companies Acts the previous dissolution of the bank in Russia was to be ignored, so that for such purposes the relationship of banker and customer must be deemed to continue until the commencement of the winding-up, at which date the debts to customers seeking to prove became due.

Russian and English Bank v. *Baring Bros. & Co. Ld.* [1932] 1 Ch. 435; 48 T.L.R. 193 and *Russian and English Bank and Guedalla* v. *Baring Bros. & Co.* [1936] A.C. 405; 52 T.L.R. 393; [1936] 1 All E.R. 505 applied.

ADJOURNED SUMMONS.

The summons was taken out in the compulsory liquidation of Russian Commercial and Industrial Bank (hereinafter called "the bank") by the applicant as a creditor of the bank asking that the decision of the official receiver as liquidator rejecting the applicant's proof might be reversed.

The bank was incorporated in Russia in the year 1890 with a view to carrying on the business of bankers in Russia and elsewhere. The bank did in fact carry on such business in Russia until the month of December, 1917, when the Bolsheviks took possession of the bank's head office and branch offices in Russia and confiscated all its assets. It was common ground between the parties that the bank was dissolved under the laws of the Union of Soviet Socialist Republics in December, 1917, or January, 1918, the exact date being immaterial.

In 1911 the bank established a place of business in England and filed the particulars required to be filed by section 274 of the Companies (Consolidation) Act, 1908. Banking business was conducted at the English branch from 1911 until long after the dissolution of the bank in Russia. On February 3, 1922, a petition for the compulsory winding-up of the bank was presented to the court, and on October 24, 1922, an order was made on that petition for the compulsory winding-up of the bank.

The applicant was the executor of one Emil Albert Ronaasen, who died in 1935, and who for many years prior to the winding-up order had a current account with the bank at the London branch. During the late war virtually all the documents of the London branch were destroyed by enemy action, and consequently there were gaps in the evidence, which otherwise would have been much more detailed. So far as this current account was concerned, the only document in evidence was a statement on the paper of the London branch showing a credit balance due to Mr. Ronaasen of 36,430 roubles 65 kopecks on July 1, 1921. It was not strictly proved what sum was owing on this current account to Mr. Ronaasen at the date of the dissolution of the bank, and it was impossible to do so. In order, however, to obtain a decision on this summons, which was a test case, brought by the applicant at the request of the liquidator, the liquidator was prepared to admit for the purposes of this particular summons, but for those purposes only, that at all material times the bank owed Mr. Ronaasen 36,430 roubles on current account.

Raymond Jennings Q.C. and *Peter Foster* for the applicant. The date of the conversion of the debt into sterling should be the date of the dissolution in Russia, when roubles were quoted on the London market at about 360 to £1 sterling. In 1922, when the winding-up began, roubles had become practically worthless. The liquidator contends that that is the proper date for conversion.

The applicant submits four points; first, in a winding-up a proof of debt in a foreign currency must be for a sum in sterling converted on the date when the debt became due; secondly, the law of the country issuing the currency must be applied in ascertaining what at the relevant date was legal tender for a foreign currency debt; thirdly, the rate of exchange applicable is the commercial rate obtainable in a recognized and accessible market in London; fourthly, the debt became due when the bank was dissolved by the Russian decrees in 1917 or 1918.

The proposition that in an action or winding-up the date of conversion is that when the debt became due is established by *In re British American Continental Bank Ld.*,[1] approved and followed in *Madeleine Vionnet et Cie.* v. *Wills* [2]; this view is accepted by Dr. Cheshire (see Private International Law, 4th ed., p. 663), who does not share the doubt expressed in the sixth edition of Dicey's Conflict of Laws, at p. 745, whether the date of judgment may not be correct; there can now be no foundation for such a surmise.

That the question that what was legal tender at the appropriate date must be determined by the law of the foreign currency in question is established by *In re Chesterman's Trusts*,[3] *Pyrmont Ld.* v. *Schott* [4] and *Marrache* v. *Ashton*.[5] The last case also shows that the market rate in London is the proper rate to apply.

Finally, the debt became due when the bank was dissolved by the Russian decrees. The ordinary rule is that a debt due by a bank on current account does not become due until a demand is made. But a demand may be waived expressly or impliedly. When a bank is forcibly dissolved it is impossible to make a demand; the necessity for a demand is waived, and the dissolution amounts to a repudiation of the debt. Although the English branch continued to do business after the dissolution, there is no authority which shows that it legally could do so. *Russian and English Bank* v. *Baring Brothers & Co. Ld.*[6] and *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de*

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[1] [1922] 2 Ch. 575; 38 T.L.R. 785.

[2] [1940] 1 K.B. 72; 56 T.L.R. 15; [1939] 4 All E.R. 136.

[3] [1923] 2 Ch. 466.

[4] [1939] A.C. 145; 55 T.L.R. 178; [1938] 4 All E.R. 713.

[5] [1943] A.C. 311; 59 T.L.R. 142; [1943] 1 All E.R. 276.

[6] [1932] 1 Ch. 435; 48 T.L.R. 193.

Mulhouse[7] show that a dissolved Russian bank which is not being wound up in England has no existence anywhere; no branch can continue to have a legal existence. The relationship of banker and customer is explained in *Joachimson* v. *Swiss Bank Corporation.*[8] A balance on current account is a loan by the customer to the banker; it is ordinarily payable on demand, and for that reason the banker may not terminate the contract without reasonable notice; a repudiation by the bank of the customer's right to be paid would operate as a waiver of the bank's right to a demand; here, the dissolution operated as a repudiation. *Crosskill* v. *Bower*[9] shows that a current account contract is terminated when the banker dies, becomes bankrupt, or is dissolved. It is true that it appears from *Russian and English Bank and Guedalla* v. *Baring Brothers & Co. Ld.*[10] that in a winding-up the court for some purposes ignores the previous dissolution of a foreign corporation, but the case is no authority for the proposition that the English branch could carry on business after the dissolution.

Raymond Walton for the liquidator. After the dissolution of the bank in Russia the English branch continued banking business until the winding-up. That gives rise to difficult problems, the solution of which was the suggestion of Eve J. in *Russian and English Bank* v. *Baring Brothers & Co. Ld.*,[11] when he said that the liquidator in an English winding-up could ratify the post-dissolution transactions; Lord Atkin pursued the same line of thought in *Russian and English Bank and Guedalla* v. *Baring Brothers & Co. Ld.*[12] The only practical course for the liquidator is to take the assets and liabilities found on his assumption of office, and to ratify everything that has been done before. If he so ratifies, he is entitled to credits as well as debits; he can credit himself with this fact, that there was something which always held itself out as the bank and which would at any time have paid to the claimant his roubles. He never made a demand for them, and that is sufficient to dispose of this case.

This was a current account, and, accordingly, payable on demand. There has been no demand, so the applicant must establish that the dissolution in Russia was an implied repudiation and a waiver of any demand. It is a little hard on the bank to say that its enforced and involuntary dissolution amounted to a repudiation of its liabilities; if that was so the period of limitation in favour of a dissolved corporation would begin to run from the date of dissolution, contrary to the decision in *In re Russo-Asiatic Bank.*[13] Either the bank was in full vigour, so that a demand could be made, or else it had been destroyed, so that no demand could be made, and it could not be said to have failed to comply.

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[7] [1923] 2 K.B. 630; 39 T.L.R. 561.

[8] [1921] 3 K.B. 110; 37 T.L.R. 534.

[9] (1863) 32 Beav. 86.

[10] [1936] A.C. 405; 52 T.L.R. 393; [1936] 1 All E.R. 505.

[11] [1932] 1 Ch. 435, 444.

[12] [1936] A.C. 405, 429.

[WYNN-PARRY J. *Joachimson's* case[14] shows that a demand is only required when it can be effective; there would be no use in making a demand on a defunct company.]

If the debt became due at dissolution, and the English winding-up were delayed beyond six years, the debt would be statute barred. Further, the material date is not necessarily when the debt became due, but when it became payable: *Cummings* v. *London Bullion Co. Ld.*[15] The only way in which this debt can be payable is in an English winding-up, so that the proper date for conversion must be that of the winding-up.

Repudiation of a contract requires a positive act on the part of the party repudiating; the involuntary dissolution of a bank does not constitute a refusal to perform its contracts: *Johnstone* v. *Milling.*[16] Even assuming that there was a repudiation, the other party can elect to accept it or not, and if the repudiation is not accepted the contract is not broken: *Avery* v. *Bowden*[17]; the claimant took no positive step to accept the repudiation by way of presenting a winding-up petition.

To sum up: (1) as the liquidator has been forced to recognize transactions done in the name of the bank after the dissolution, he is entitled to rely on the fact that the London branch could have discharged the debt, had there been a demand; (2) repudiation requires a positive act on the part of the person repudiating, or, at least, submission to an order for compulsory winding-up; (3) death or dissolution is not an equivalent to repudiation; (4) repudiation gives to the other party the right to treat the contract as at an end; it was not so treated; on the contrary, the account was maintained at the London branch; (5) even if the debt did become due on the dissolution, it did not become payable except in the course of the winding-up. It follows that the applicable date for conversion is that of the winding-up order.

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[13] [1934] Ch. 720.

[14] [1921] 3 K.B. 110.

[15] [1952] 1 K.B. 327; [1952] 1 All E.R. 383.

[16] (1886) 16 Q.B.D. 460; 2 T.L.R. 249.

[17] (1855) 5 E. & B. 714.

Raymond Jennings Q.C. in reply. It is conceded by the liquidator that a winding-up order operates as a waiver of a demand. A fortiori a dissolution must so operate. There is no basis for the distinction between a debt becoming due and becoming payable. *Cummings'* case [18] was based on special circumstances relating to exchange control, and is not of general application.

Cur. adv. vult.

1954. Dec. 14. WYNN-PARRY J., reading his judgment, stated the facts and continued: It is conceded in respect of the credit balance to this account, 36,430 roubles 65 kopecks, that the applicant has a right of proof. For the purposes of proof that sum in roubles must be converted into sterling, and the two questions with which I am concerned are (1) as at what date and (2) at what rate is the conversion to be effected.

It will be convenient to deal with the second question first because only two dates have been suggested as the dates respectively as at which conversion should take place, namely, the date of the dissolution of the bank in Russia and the date of the commencement of the winding-up of the bank. The evidence as to the rate of exchange between the rouble and the pound sterling on each of those dates is scanty; but for the purposes of this summons I propose to proceed on the basis that at the date of the dissolution of the bank in Russia the rate was 360 roubles to £1 sterling and that at the date of the presentation of the petition the rate was 400,000 roubles to £1 sterling. The effect is that if the applicant succeeds in his contentions on the first question he will be entitled to prove for something over £100; if the liquidator succeeds the applicant will only be entitled to prove for about two shillings.

I turn, therefore, to consider the substantial question which arises, namely: As at what date is the conversion to be effected?

The first proposition which Mr. Jennings put forward was that in a winding-up by this court a proof for a debt expressed in foreign currency must be for a sum in sterling converted as at the date when the debt became due. I agree with Mr. Jennings that this proposition is established by the authorities, which he cited. First there is the judgment of P. O. Lawrence J. in *In re British American Continental Bank Ld.*,[1] where he reviewed the prior authorities. As I understand his judgment, he is to be taken as having stated the rule, as a rule of general application, that on a claim in the winding-up of a company in England for a debt due from the company to the claimant in foreign currency the correct date on which that debt ought to be converted into sterling, for the purpose of ascertaining the amount for which the claimant ought to be admitted as a creditor, is the date when the debt became due. This decision was approved and followed by the Court of Appeal in *Madeleine Vionnet et Cie.* v. *Wills.*[2]

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[18] [1952] 1 K.B. 327.

[1] [1922] 2 Ch. 575; 38 T.L.R. 785.

In this connexion I feel bound to say that I do not accept the statement in the sixth edition of Dicey's Conflict of Laws at p. 745, paragraph (3) of rule 165: " Whether a debt " expressed in foreign currency must, for the purpose of litiga-" tion in England, be converted into sterling with reference to " the rate of exchange prevailing on the day when the debt was " payable or with reference to the day of the judgment is an " open question." It is certainly not an open question in this court, nor, I apprehend, in the Court of Appeal; nor am I aware of any observations in any later authorities indicating any dissatisfaction with the general rule to which I have referred. I observe that in the argument for the appellants in *Madeleine Vionnet et Cie.* v. *Wills,*[3] the relevant passage from the fifth edition of Dicey's Conflict of Laws was quoted: " The rule is " stated in Dicey's Conflict of Laws, fifth edition, p. 728, r. 181, " as follows: ' When a debtor, or upon the breach of a contract, " ' a person in default, becomes liable for the payment of a sum " ' of money in a foreign currency, the debt or damages for the " ' purpose of an English judgment must be assessed at the date " ' of the debt becoming due or the default, and the sum pay-" ' able must be converted into English currency at the rate of " ' exchange current at that date.' "

Dr. Cheshire, in the fourth edition of his book on Private International Law, at p. 663, says this: " There was formerly a " controversy whether the rate of exchange prevailing at the date " of the wrong or at the date of the judgment must be followed " in making this conversion from foreign to English currency. " The date chosen may be of great importance to the parties in " view of the violent fluctuations of the rate of exchange that not " infrequently occur in the modern world. It is now settled that " the relevant date is the date of the wrong. The extent of the

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[2] [1940] 1 K.B. 72; 56 T.L.R. 15; [1939] 4 All E.R. 136.

[3] [1940] 1 K.B. 72, 73.

" loss for which the plaintiff is entitled to compensation falls to " be determined at the date when it was suffered, not at the date " when the judgment happens to be delivered."

Finally I would add that Mr. Walton, who appeared for the liquidator, said, in my view very properly, that he was unable to support the statement which I have quoted from the sixth edition of Dicey's Conflict of Laws. The subject of private international law is difficult enough without unnecessary doubts being cast on a clearly established rule.

Mr. Walton contended, however, that a gloss had been made on the rule by the Court of Appeal in the recent case of *Cummings* v. *London Bullion Co. Ld.*[4] As I read that case the Court of Appeal expressly recognized the general rule, which I have stated above, but felt compelled to choose a different date from the date when the debt became due, because of the construction which they placed on section 33 of the Exchange Control Act, 1947. I cannot, therefore, regard this case as in any way impinging on the general rule. In the present case I find no circumstance which should militate against its application. I therefore hold that the date as at which the sum in roubles should be converted into sterling is the date when they became payable to Mr. Ronaasen.

Then comes the crucial question: At what date is the debt on current account to be treated as having become due? As I have said, the debt was one which was owed by the bank as banker to Mr. Ronaasen as customer. The incidents of that relationship are discussed by Atkin L.J. in *Joachimson* v. *Swiss Bank Corporation.*[5] In the course of his judgment he said[6]: " I think that " there is only one contract made between the bank and its " customer. The terms of that contract involve obligations on " both sides and require careful statement. They appear upon " consideration to include the following provisions. The bank " undertakes to receive money and to collect bills for its " customer's account. The proceeds so received are not to be " held in trust for the customer, but the bank borrows the " proceeds and undertakes to repay them. The promise to repay " is to repay at the branch of the bank where the account is kept, " and during banking hours. It includes a promise to repay any " part of the amount due against the written order of the customer

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[4] [1952] 1 K.B. 327; [1952] 1 All E.R. 383.

[5] [1921] 3 K.B. 110; 37 T.L.R. 534.

[6] [1921] 3 K.B. 110, 127.

"addressed to the bank at the branch, and as such written orders "may be outstanding in the ordinary course of business for two "or three days, it is a term of the contract that the bank will not "cease to do business with the customer except upon reasonable "notice. The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the "bank or to facilitate forgery. I think it is necessarily a term "of such contract that the bank is not liable to pay the customer "the full amount of his balance until he demands payment from "the bank at the branch at which the current account is kept. "Whether he must demand it in writing it is not necessary now "to determine. The result I have mentioned seems to follow "from the ordinary relations of banker and customer, but if it "were necessary to fall back upon the course of business and "the custom of bankers, I think that it was clearly established "by undisputed evidence in this case that bankers never do make "a payment to a customer in respect of a current account except "upon demand."

At the end of his judgment he said this[7]: "Finally it is "perhaps unnecessary to say that the necessity for a demand "may be got rid of by special contract or by waiver. A repudiation by a bank of the customer's right to be paid any particular "sum would no doubt be a waiver of any demand in respect of "such sum."

Now as I read that paragraph, Atkin L.J. was not designing to make an exhaustive statement as to the circumstances in which a demand by the customer would be unnecessary. He gave waiver by the banker as an example and he gave repudiation as a possible example of waiver. Much debate turned on the word "repudiation." Mr. Jennings urged on me that by going out of existence the bank must be treated as having repudiated the debt, and therefore the necessity of a demand had been waived. On the other hand, Mr. Walton contended that repudiation demanded some volition on the part of the person or body alleged to have committed the repudiation, and that no such volition was possible on the part of the bank, because the circumstance alleged to constitute repudiation was the involuntary suffering of extinction.

For myself I prefer to approach this aspect of the matter from a different point of view. The last paragraph in the judgment of Atkin L.J. in *Joachimson* v. *Swiss Bank Corporation*[8] proceeds, as I read it, on the assumption of the continued existence of the relationship of banker and customer; it is an incident of that relationship so long but only so long as it lasts; just as the banker has the corresponding obligation not to stop acting as the customer's banker without reasonable notice. But if the relationship of banker and customer is terminated, there can be no need for either of those incidents of that relationship to continue, and indeed they must cease with the termination of the relationship. Thereafter, it appears to me that on such termination any balance belonging to the customer in the hands of the banker becomes payable to the customer.

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[7] [1921] 3 K.B. 110, 132.

[8] [1921] 3 K.B. 110.

In this case the bank was dissolved in December, 1917, or January, 1918, it matters not which. In my view the effect of that dissolution was to terminate the relationship of banker and customer. The persona juridica having ceased to exist, it appears to me impossible to say that the previous relationship of banker and customer continued.

In October, 1922, came the order for compulsory winding-up. The effect of such an order in relation to a foreign dissolved company has been authoritatively stated by Lord Atkin in *Russian and English Bank and Guedalla* v. *Baring Brothers & Co.*[9] In the course of his speech he said [10]: " My Lords, I think that we are " entitled to imply, indeed I think it is a necessary implication, " that the dissolved foreign company is to be wound up as " though it had not been dissolved, and therefore continued in " existence. This seems to me with respect the necessary result " of saying that it shall be wound up in accordance with the " provisions of the Act. There is nothing abnormal in such a " provision. The municipal law of this country, as of other " countries, accepts the principle of international law that " countries ordinarily accept the existence of juristic persons " brought into being or recognized as existing in their country of " origin. Similarly they accept the destruction or cessation of " such a juristic personality under the law of its country of origin. " But if the municipal law choose it may in defined conditions " refuse to accept or may accept only under conditions either the " creation or destruction of a foreign juristic person: whether it " has done so is for the municipal courts to decide, but if it has, " then the municipal court must accept the situation. I see " nothing incongruous in the legislature saying in effect, we accept " the existence of a foreign corporation coming to trade in this

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[9] [1936] A.C. 405; 52 T.L.R. 393; [1936] 1 All E.R. 505.

[10] [1936] A.C. 405, 427.

" country; we shall only impose a condition of registration. But " if the corporation does trade here, acquires assets here and " incurs debts here, we shall not accept its dissolution abroad " without a stipulation that if desirable it may be wound up here " so that its assets here shall be distributed amongst its creditors " (I do not stay to consider whether its English creditors or " creditors generally) and for the purpose of the winding-up it " shall be deemed not to have been dissolved; for that event " would defeat our municipal provisions for winding up a " corporation. This does not appear to me to be recreating or " reconstituting a new corporation; it is for particular and limited " purposes refusing to recognize the dissolution of the old."

It is to be observed that Lord Atkin was careful to say that the refusal to recognize the dissolution was for particular and limited purposes and not for all purposes. The particular and limited purposes are as he states " so that its assets here shall be distributed amongst its creditors " and " for the purposes of the " winding-up it shall be deemed not to have been dissolved."

The interesting question then presents itself: What is the scope of the phrase " for the purposes of the winding-up it shall be " deemed not to have been dissolved " ? If a foreign company is dissolved according to the law of the country of its incorporation, and is subsequently wound up here, can any recognition be given, for the purposes of the winding-up, to the fact of dissolution? The question is a very real one in the case of a company such as the bank, because the evidence shows that for a considerable time after its dissolution in Russia business was carried on at the London branch and transactions in the normal course of banking business were entered into as if the dissolution had not occurred. It is surely clear that in the winding-up of the bank and similar companies, regard must be had to those post-dissolution transactions. The difficulty of doing otherwise is recognized by Lord Atkin in *Russian and English Bank and Guedalla* v. *Baring Brothers & Co.* He said [11]: " Nor is it any " easier to confine the distribution to assets existing at the date " of the dissolution amongst creditors in existence at the same " date."

Again, in the earlier case of *Russian and English Bank* v. *Baring Brothers & Co. Ld.*[12] Eve J. said [13]: " But I cannot help " thinking that these difficulties can be mitigated, and the acts

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[11] [1936] A.C. 405, 429.

[12] [1932] 1 Ch. 435; 48 T.L.R. 193.

[13] [1932] 1 Ch. 435, 444.

"of those who have intermeddled with the affairs and assets of "the branch, after the destruction of the parent company, be "regularized by adoption and ratification by a liquidator in a "winding-up constituted under section 338 of Part X of the "Companies Act, 1929."

For myself I can see no other logical conclusion than that for all purposes of the liquidation concerning the distribution of assets among the creditors the dissolution of the bank is to be ignored. A customer of the bank to whom money is owing on current account at the date of dissolution can only obtain payment (either in whole or in part) by proving in the winding-up; but if he proves in the winding-up he must accept that the dissolution which, looked at outside the winding-up, was effective to determine the relation of banker and customer, is to be treated by the liquidator, who examines his claim, and the court which may have to pronounce on it, as not having taken place. In other words, he can rely on the dissolution as having terminated the relation of banker and customer, if he stays outside the winding-up, in which case he will be without remedy; or, on the other hand, he can prove in the liquidation, in which case he must accept the non-recognition by the liquidator and the court of the event which in fact caused the termination of the relationship of banker and customer between the bank and himself. In the liquidation, therefore, the relationship must be deemed to have continued. On this basis the commencement of the liquidation is the earliest date when that relationship came to an end; and that is the date when the debt became due.

The summons must therefore be dismissed.

Judgment for the liquidator.

Solicitors: *Nisbet, Drew & Loughborough; Slaughter & May.*

F. R. D.

SMITH *v.* CARDIFF CORPORATION (No. 2).

[1953 S. 3325.]

1954
Dec. 6, 7, 8, 17.

Danckwerts J.

Housing—Rent—Scheme by local authority—Differential rent scheme—Right to increase rents—Reasonable rent—Validity of scheme—Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *ss.* 83 (1), 85 (5) (6).

On June 8, 1953, the Cardiff Corporation decided to introduce a differential rent scheme, which provided for additional charges above the basic rent payable by certain of the corporation's council house tenants, such charges being based on the income of the tenant, the earnings of his family and receipts from lodgers.

An action was instituted by the tenants of several of the council houses for a declaration that the scheme was ultra vires. They alleged that it was not authorized by the powers conferred by the relevant statutes and that the statutes only authorized reasonable charges to be made to tenants; and that the defects of the scheme were such that the charges could not be considered reasonable:—

Held, (1) that the powers of discrimination conferred by section 85 (6) of the Housing Act, 1936, were not confined to rebates, but included the power to increase or reduce the rents of particular tenants as circumstances might require; so that the surcharging of certain tenants according to their means was not ultra vires; (2) that, though the scheme was far from perfect and involved certain difficulties and anomalies, the imperfections were not sufficient to enable the court to hold that the defendants were in breach of their duty under section 83 (1) of the Act to charge reasonable rents.

ACTION.

On July 22, 1953, a writ was issued by the plaintiff and three other tenants of council houses " (suing on behalf of themselves " and all other tenants of houses provided by the defendants " [the Cardiff Corporation]" under Part V of the Housing Act, 1936). They sought a declaration that a decision of the corporation to introduce a differential rent scheme for council houses was ultra vires. In August, 1954, the vacation judge made an order setting aside the writ on the ground that the plaintiffs were not entitled to bring a representative action. On November 4, 1954, the Court of Appeal discharged the order of the vacation judge and directed that the writ be amended by striking out in the title the words " suing on behalf of themselves and all other " tenants of houses provided by the defendants under Part V of " the Housing Act, 1936," and by striking out in the indorsement on the writ the words " on behalf of themselves and all other " tenants of houses provided by the defendants under the said " statutory provisions." (See *Smith* v. *Cardiff Corporation*.[1])

On January 27, 1953, the estates (council house rents) subcommittee appointed by the estates committee of the corporation resolved that the council of the corporation be recommended to increase council house rents on April 1, 1953, so as to provide a general increase of 7½ per cent., and to authorize the sub-committee to make recommendations on the amounts by which the rent of each type of house should be increased.

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[1] [1954] 1 Q.B. 210; [1953] 2 All E.R. 1373.

On May 21, 1953, it was resolved that the city housing and estates manager should prepare reports relating to the recommendations of the sub-committee, and he prepared a report, dated May 29, 1953, containing proposals for a scheme of additional charges for council houses provided by the corporation (hereinafter called the " differential rent scheme ").

On June 8, 1953, the corporation, by the act of the council, decided to adopt and introduce the differential rent scheme. That scheme provided for additional charges above the basic rents for council houses. It also provided that the additional charges should vary according to certain specific matters set out in the report.

It was also part of the scheme that each tenant should make a declaration at the foot of a form giving information concerning himself and his family and other persons living in the council house of which he was the tenant, to the effect that he understood that " the giving of incorrect information hereon or failure " to notify any change which will affect the said rent charge " may be regarded as good reason for terminating the tenancy."

The plaintiffs considered that the differential rent scheme necessarily involved numerous anomalies and injustices as between tenants of council houses. They considered that the decision of the corporation was ultra vires on the ground that the additional charges purported to be authorized by the scheme, were, or resulted in, charges which were not reasonable, contrary to section 83 of the Housing Act, 1936.[2] They also contended that the above-mentioned declaration was ultra vires.

The plaintiffs and each of them, therefore, claimed " (1) A " declaration that the decision of the corporation made on June 8 " to introduce and operate a differential rent scheme for council

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[2] Housing Act, 1936, s. 83: " (1) The general management, regu- " lation, and control of houses pro- " vided by a local authority under " this Part of this Act shall be vested " in and exercised by the authority, " and the authority may make such " reasonable charges for the tenancy " or occupation of the houses as they " may determine."

S. 85 (as amended by Sch. I to the Housing Act, 1949): " (5) The " authority may grant to any tenant " such rebates from rent, subject to " such terms and conditions, as they " may think fit. (6) The authority " shall from time to time review rents " and make such changes, either of " rents generally or of particular " rents, and rebates (if any) as cir- " cumstances may require."

"houses is ultra vires and null and void; (2) Alternatively (a) a "declaration that the said decision is ultra vires and null and "void to the extent that the same purports to authorize the "imposition of the maximum increase of rent of 12s. 6d. per "week in the event of failure by any tenant to return the said "form . . . duly completed, and/or (b) a declaration that the "said decision is ultra vires and null and void to the extent "that the same purports to authorize the corporation to require "tenants of council houses to make [the declaration above set "out]."

The corporation, by their defence, stated that, since the inception of the scheme, the rent arrears and appeals sub-committee had considered and, when thought fit, granted or recommended relief in cases of hardship brought forward by council house tenants; and they denied that the plaintiffs, or any of them, were entitled to the relief claimed or to any relief.

Kenneth Diplock Q.C., *Dingle Foot Q.C.* and *P. B. D. Ashbrooke* for the plaintiffs. This differential rent scheme involves numerous anomalies and injustices as between tenants of council houses. In the case of fluctuating income, for example, a tenant is required to notify the estates manager if his wages in any four-week period result in a weekly average which exceeds £500 a year. Conversely, a tenant can receive a refund at the end of the financial year if he proves that his income has fallen below £500 a year. If the method adopted for providing for cases of undue hardship is not authorized by statute or the charges are not reasonable within the meaning of section 83 of the Housing Act, 1936, it is immaterial that machinery was set up to deal with particular cases of hardship. The scheme is one which affects over 13,000 tenants, and the mere fact that some discretionary allowance may be made in a small number of cases cannot affect the question whether this course of action was ultra vires.

The scheme is ultra vires because (1) it is not authorized by statute, and (2) the charges imposed by the corporation on certain of their council house tenants since August, 1953, are not reasonable within the meaning of section 83 of the Housing Act, 1936. With regard to the question of "reasonableness" it is submitted: (1) Under the scheme many tenants would be unable to discover the rent at the material time, i.e., when the rent was payable. It is not reasonable that a man should not know what his rent is. (2) It is impossible to assess the rent in many cases because of the absence of any definition of "family." (3) The scheme is unreasonable because it is wholly arbitrary in its operation as between one tenant and another, and because it involves certain classes of tenants subsidizing other classes of tenants. The power of the corporation is confined by section 85 (5) of the Act of 1936, as amended by the Act of 1949, to granting rebates in particular cases, and the material words of the statute must be read as words of limitation. Section 85 (6) of the Act of 1936 provides a power to review rents: it was clearly intended that the local authority should have power to reduce rents, but there is no power to increase the rent on account of the tenant's circumstances. Under subsection (6) there is an obligation to review the right to rebate from time to time. In any case there is no power to increase the rents of certain classes of tenants in such a manner as will result in their subsidizing other tenants. [Reference was made to *Leeds Corporation* v. *Jenkinson*,[3] *London Association of Shipowners* v. *London and India Docks Joint Committee*[4] and *Short* v. *Poole Corporation*.[5]]

Edmund Davies Q.C. and *David Pennant* for the defendant corporation. Reasonable charges in section 83 of the Act of 1936 mean reasonable charges for the tenancy or occupation of a particular form of house by anybody. Section 83 gives the corporation a discretion, and the only limitation is that it must be exercised honestly. This is a reasonable scheme. The corporation came to the conclusion that by a means test they could most conveniently ascertain the tenants who would best be able to bear the increase. There should be no real moral indignation against the idea of certain classes of tenants subsidizing others. That is a fallacy based on the assumption that the existing rent is the full economic rent, less subsidies and the cost of repairs. The test is whether a reasonable charge has been made for a particular house. [*Belcher* v. *Reading Corporation*,[6] *Leeds Corporation* v. *Jenkinson*[7] and *Attorney-General for Ontario* v. *Canadian Niagara Power Co.*[8] were referred to.]

Dingle Foot Q.C. in reply. *Prescott* v. *Birmingham Corporation*[9] is an example of the class of case where a discretion was conferred by statute without any words of limitation and the

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[3] [1935] 1 K.B. 168; 51 T.L.R. 19.

[4] [1892] 3 Ch. 242; 8 T.L.R. 717.

[5] [1926] Ch. 66; 42 T.L.R. 107.

[6] [1950] Ch. 380; 65 T.L.R. 773; [1949] 2 All E.R. 969.

[7] [1935] 1 K.B. 168; 51 T.L.R. 19.

[8] [1912] A.C. 852.

[9] [1954] 3 W.L.R. 990; [1954] 3 All E.R. 698.

1954

SMITH
v.
CARDIFF
CORPORATION
(No. 2).

courts held that a limitation must be held to exist, and that if the local authority had exercised their discretion improperly their actions were ultra vires.

Subsection (6) of section 85 is put in as part of the general scheme, so that the local authority may be granted protection. Their conduct in the present case is somewhat different from an exercise of discretion. Here there is something which for financial reasons they are required to do. Subsection (6) comes into play when the local authority may have to respect the amenities of particular houses. As to the legality of the changes, that is a question of the construction of the scheme, i.e., not what is to be done, but the way in which it is to be done. There are certain matters in the scheme which may invalidate it. [Reference was made to *Attorney-General for Ontario* v. *Canadian Niagara Power Co.*[10]; *Ex parte Voisey*[11]; *Howell* v. *Falmouth Boat Construction Co.*[12]; *Prescott* v. *Birmingham Corporation*[13]; *Liversidge* v. *Anderson*,[14] and *Fattorini (Thomas) (Lancashire) Ld.* v. *Inland Revenue Commissioners*.[15]]

Cur. adv. vult.

December 17. DANCKWERTS J. read the following judgment. This is an action against the Corporation of the City of Cardiff by four tenants of houses provided by the corporation, commonly called "council houses." The subject of the action is a differential rent scheme introduced by the corporation in respect of their houses, under which provision is made for the payment of higher rents by certain tenants. The scheme is alleged by the plaintiffs to be ultra vires and unreasonable, and, therefore, to be null and void.

The scheme was introduced by the corporation as a result of a report by the city treasurer, which estimated prospective deficits in the housing revenue account (required to be kept by the corporation under the Housing Act, 1936) rising from £29,153 in the financial year 1953–54 to £77,733 in the financial year 1956–57, and amounting in the aggregate for four years to £224,882. The original recommendation of the estates committee was an overall increase of 7½ per cent. to all rents on

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[10] [1912] A.C. 852.

[11] (1882) 21 Ch.D. 442.

[12] [1951] A.C. 837; [1951] 2 T.L.R. 151; [1951] 2 All E.R. 278.

[13] [1954] 3 W.L.R. 990; [1954] 3 All E.R. 698.

[14] [1942] A.C. 206; 58 T.L.R. 35; [1941] 3 All E.R. 338.

[15] [1942] A.C. 643; [1942] 1 All E.R. 619.

April 1, 1953. But subsequently the differential scheme was recommended to and adopted by the council. This scheme is not novel and was based, it appears, on a scheme carried into effect by the Plymouth County Borough Council, and there are, I understand, differential schemes of a somewhat similar nature operated by other local authorities for the purpose of houses provided under the Housing Acts. It is said that the houses of the corporation concerned number 14,267, and that 6,826 tenants are affected by the scheme.

The scheme was notified to tenants of the corporation in a circular dated June 26, 1953, the terms of which are as follows: "Dear Sir or Madam, Will you please complete and return to "the rent collector on the next rent collection day the rent "re-assessment form overleaf, so that your rent may be revised "and amended as necessary, in accordance with the under-"mentioned decision of the city council which operates as from "a date in the near future of which you will be notified. If "unable to hand same to the rent collector, will you please "return the form through the post within the next seven days. "Yours faithfully, W. M. Brook, City Housing and Estates "Manager. Decisions of the city council. A differential rent "scheme involving the following additions to basic rents will be "operative as above mentioned. In respect of:

	Addition per week
"(a) A tenant in receipt of a gross income at the "rate of £500 per annum or over and less "than £600	8s. 6d.
"(b) A tenant in receipt of a gross income at the "rate of £600 per annum or over	12s. 6d.
"(c) Each unmarried adult wage or salary earning "child of tenant (up to two in number) ...	2s. 6d.
"(d) Wife, if wage or salary earning	2s. 0d.
"(e) Each additional family (other than a sub-"tenant's family)	5s. 0d.
"(f) Each lodger or sub-tenant	5s. 0d.

"The total additions in respect of any tenancy are not to exceed "12s. 6d. per week. 'Gross income' includes salary, wage, "overtime, extra earnings, interest, profits, allowances (exclud-"ing family allowances, but including superannuation allow-"ance), emoluments and pension, before any deduction for "income tax, national insurance, pension or superannuation "contributions have been made. Gross income also includes pay "and any allowance or emoluments received by the wife or other "members of the family in respect of current service of the "tenant in H.M. Forces, but excludes a disability pension, the "family allowances made for children under the Family Allow-"ances Act, 1945, as amended, wife's earned income and pay-"ments by sons, daughters, lodgers and sub-tenants. 'Adult' "means a person of 21 years of age or over. 'Tenant' includes "joint tenants. N.B.—In the event of the failure of any tenant "to return the form duly completed, the council will assume "that the maximum charge of 12s. 6d. per week is applicable, "and will increase the rent accordingly."

On the back of the circular there was a form to be filled in by the tenant giving particulars of the tenants' occupation and gross income and details of other members of the household.

As a result of the information thus obtained the corporation reassessed the rents of numbers of their tenants and served notices to quit on them, terminating their weekly tenancies on August 17, 1953, but offering them at the same time new tenancies on the terms of the reassessment notice. The reassessment notice stated: "The rent of the premises is calculated "by the city council by reference to a basic rent and additions "thereto based on the tenant's gross income and the persons "residing at the premises. Such additions are assessed in "accordance with the following scale:—" The charges already mentioned are then set out, with the addition of the following requirement: "The tenant is required (a) at all times, when "requested so to do by the city housing and estates manager, to "furnish in writing correct and proper information as to his or "her gross income and as to the persons residing on the premises; "(b) immediately to notify in writing the city housing and "estates manager of any changes in the tenant's gross income "or in the number of persons residing at the premises whenever "such changes warrant an alteration of the additional charges "as above mentioned."

Then after setting out the details of the reassessment of the tenant's rent, the notice (which is sent in the name of the city housing and estates manager) continues:—"Alterations in the "rent assessment as above mentioned, so far as decreases are "concerned, will be made as from the first rent day after the "receipt by me of written notification from you of a change in "circumstances which warrants an adjustment in such rent. "Increases will operate from the first rent day following the "date when notification of the change should have been sent to "me pursuant to the above mentioned additional conditions of "tenancy."

A provision for alleviating the hardship of an increase in certain cases is indicated in a note—"Note. The city council "is prepared to give consideration to an appeal by a tenant "against the assessment of any addition or additions to his or "her basic rent, as a result of the operation of the above "mentioned scale, in any case in which the circumstances, in "the discretion of the city council, warrant such consideration. "Appeals must be in writing addressed to 'The Housing and "'Estates Manager, 21/23, Charles Street, Cardiff.'"

At a later date a further alleviation in cases of hardship was intended to be provided by a direction to the city estates manager that he should use his discretion in waiving the charge in respect of a wage or salary earning wife where the amount so earned is under £2 per week, unless, in the circumstances, he considers that no hardship will be caused by such a charge. This is a minor matter; but if the discretion as to charges is committed by the Act to the corporation, it seems to me that this discretion could not be delegated in this way to the city estates manager. The right course (which seems to be the course indicated in the case of appeals to the appeals sub-committee) is for the cases to be reported with a recommendation to the council, who should make the actual decision.

The scheme has now been operated for some time. But the attack on its validity has been delayed by the course which this action has taken. The four plaintiffs originally attempted to sue on behalf of themselves and all the other tenants, in a representative capacity, and the date of the writ was July 22, 1953. On August 12, 1953, the writ was set aside by the vacation judge, but on November 4, 1953, the Court of Appeal, though holding that the plaintiffs could not proceed in a representative capacity, gave leave to amend the writ, so that they might remain as plaintiffs in their individual capacities and the action might be regarded as a test action—*Smith* v. *Cardiff Corporation.*[1] The writ was amended accordingly on December 21, 1953, and the statement of claim was delivered on February 11, 1954.

By a circular dated May 31, 1954, certain modifications of the scheme were notified to the tenants. The most important of these were provisions designed to alleviate hardship in cases where the gross annual income of a tenant only slightly exceeded the figures of £500 or £600. From this document it appears (which was not stated in the earlier circulars) that the relevant yearly period is the financial year ending on March 31.

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[1] [1953] 3 W.L.R. 994; [1953] 2 All E.R. 1373.

The validity of the scheme is attacked on behalf of the plaintiffs on two main grounds. The first is that such a scheme is not authorized by the powers conferred upon local authorities by the relevant Acts, and is therefore ultra vires. The basis of the other is that the Acts only authorize reasonable charges to be made to tenants and the defects of this scheme are such that the charges cannot be considered to be reasonable. The first appears to be a matter of principle, while the other depends on some detailed consideration of the terms of the scheme.

The question whether such a scheme is within the statutory powers of the corporation must depend on the terms of the Acts which confer these powers, and I turn, therefore, to a consideration of the relevant sections.

First of all it is desirable to notice the general financial scheme of the Acts. Under section 114 of the Housing Act, 1936, where the local authority receives a contribution or subsidy from the national exchequer, the local authority have to make out of their general rate fund the contributions set out in the Eighth Schedule to the Act; and by paragraph eight of that schedule, when in any financial year a deficit is shown in the housing revenue account, a contribution (in the Act referred to as an additional contribution) for that financial year of an amount equal to the amount of the deficit has to be made out of the rate fund, so that a deficit cannot be carried over to the following year. An obligation is imposed by section 128 on the local authority to keep a housing revenue account of the income and expenditure of the authority in respect of the houses provided by the authority. Section 129 sets out the matters which are to be carried to the credit and the debit respectively of the housing revenue account. Section 130 provides for the disposal of balances on the account, and under this section a surplus may be carried forward to any other year. For the purpose of equalizing the annual charges in respect of the repair and maintenance of houses, authorities are required by section 131 to keep a housing repairs account, to which they are required to carry in each financial year a sum in respect of each house amounting at the present time to £8. These are the general provisions of the Act.

The charging powers in respect of rents are contained in a group of sections designated by the description " Management, " etc., of Local Authority's Houses." Section 83 (1) provides as follows: " (1) The general management, regulation, and control " of houses provided by a local authority under this part of this " Act shall be vested in and exercised by the authority, and the " authority may make such reasonable charges for the tenancy or " occupation of the houses as they may determine."

Section 85 (1) provides: " (1) A local authority shall, in " relation to all houses and dwellings in respect of which they " are required by section one hundred and twenty-eight of this Act " to keep a housing revenue account, observe the requirements " specified in the following provisions of this section."

Subsection (5) originally provided: " (5) In fixing rents the " authority shall take into consideration the rents ordinarily payable by persons of the working classes in the locality, but may " grant to any tenant such rebates from rent, subject to such " terms and conditions, as they may think fit."

The Housing Act, 1949, which deleted from the Act of 1936 all the references to the working classes, probably because the functions of the local authorities had been extended to provision of more houses generally, and not only the provision of houses for particular classes of persons, substituted, for the above-mentioned subsection, a new subsection in the following terms:

" (5) The authority may grant to any tenant such rebates " from rent, subject to such terms and conditions, as they may " think fit," and this is the provision which is operative at the present time. Subsection (6) of section 85 provides as follows: " The authority shall from time to time review rents and make " such changes, either of rents generally or of particular rents, " and rebates (if any) as circumstances may require."

This subsection appears to impose a duty on the authority and not merely to confer the powers, as sections 83 (1) and 85 (5) do.

In *Belcher* v. *Reading Corporation*,[2] Romer J. had to consider the duties of the authority in exercising the powers and carrying out the duties which are conferred or imposed on them by the Act. He described their obligation generally in these terms [3]: " It is, of course, clear that they have to consider the welfare " of their tenants and to remember that those tenants are

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[2] [1950] Ch. 380, 391.

[3] Ibid. 391.

"people of small—sometimes of very small—means. On the "other hand they have also to be mindful of the interests of "the ratepayers as a whole—the majority of whom, in Reading, "as I was informed, are people of comparable means with the "tenants of the council houses. It is their duty, so far as "possible, to maintain a balance between these two sections of "the local community, having due regard, of course, to any "specific requirements of the Housing Acts. If the council house "rents were much below those prevailing in comparable private "estates in the locality, then prima facie a local authority might "be suspected of unduly favouring the tenants; while, if they "were much in excess of such other rents, the presumption would "be the other way round."

That there might lawfully be discrimination between tenants of different houses of the same type by reason of the variation in the means of the tenants was recognized in *Leeds Corporation* v. *Jenkinson*,[4] though this was a case decided in regard to the Housing (Financial Provisions) Act, 1924, which imposed a limit on the aggregate of the rents by reference to an outside standard, and defined the normal rent by reference to the rent normally charged in the area of the local authority in the case of working-class houses erected prior to August 3, 1914. Romer L.J. said [5] that, as the aggregate limit was not exceeded, it appeared to him "impossible to say that the action of the corporation in discriminating between one house and another of the same class "in the same area, to the extent of charging more in respect of "one house than in respect of another, is ultra vires or is a "breach of their undertaking."

Goddard J. said [6]: "The Master of the Rolls has pointed out "what is the object of this legislation. It is to provide houses "for the classes of the community who cannot afford to pay "economic rents; but the object of the Act is not to provide "subsidized houses for people who can afford to pay economic "rents. It seems to me that all the corporation are doing by this "plan is to see that persons who can afford to pay economic "rents for these houses shall pay them, which will enable them, "of course, to make greater concessions in the rents to persons "who cannot afford to pay economic rents."

It is true that in neither of these cases was there any question of grading up the rents of particular tenants. It is indeed admitted that discrimination in the rents charged to tenants of comparable houses by reason of the varying means of the tenants is admissible. It was admitted on behalf of the plaintiffs in the present case, I understood, that if the Cardiff Corporation had chosen to increase all the rents of their houses by 12s. 6d. a week (the maximum advance proposed under the present scheme) and had relieved tenants from this increase in varying degrees or completely according to their means, no objection could be taken. But it is the method by which the result is obtained to which objection is taken. It is said that the only power of the corporation to make such discrimination is contained in section 85 (5), which confines the power of the corporation to the granting of rebates to particular tenants. For this argument, there are called in aid the observations of Lindley L.J. in *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*[7] (in reference to the powers of a dock-owning company): "As owner, the company could make any regulations it might "think proper for the use of its property; it could charge what "it liked and could shut its docks altogether if people would not "comply with its demands. These powers, however, are not "unchecked by statute. The legislature has expressly conferred "upon the company many powers which the company, as the "owner of property, could have exercised without any express "statutory authority. Whenever this is the case, the powers "expressly given must be treated either as superfluous or as "purposely inserted in order to define, that is, limit the right "conferred, and as implying a prohibition against the exercise of "the more extensive rights which the company might have by "virtue of its ownership of property. That the latter is the true "mode of regarding statutory powers conferred on bodies created "for public purposes and authorized to acquire land for such "purposes cannot, I think, admit of any doubt."

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[4] [1935] 1 K.B. 168.

[5] Ibid. 180.

[6] Ibid. 181.

These are very general observations, but they must be read in connexion with the issues for decision in the particular case. The point to be decided in the case appears to have been whether the regulations or by-laws of the dock company, which had not been passed and confirmed as required by the relevant statute, had any binding effect on shipowners in the absence of agreement. I do not think that the limiting principle applied by the court in that case is of universal application—for instance, a power conferred by a statute may be merely declaratory. In the present case, it seems to me that a power to discriminate by granting rebates of rent does not necessarily exclude the right to create a similar result by grading up the rents charged for particular houses in varying amounts.

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[7] [1892] 3 Ch. 242, 251.

Whether the plaintiffs' argument as to the effect of subsection (5) is sound or not, however, in my view it does not affect the true construction of subsection (6), which is plainly the subsection under which the corporation have been acting. That subsection casts on the corporation the duty to review from time to time the rents which they charge for their houses; the deficit with which the corporation were faced impelled them to review the rents in the light of the city treasurer's report, and to find some scheme for providing a revenue to meet or prevent a deficit. This subsection requires the corporation on such a review to make such changes of rents generally or of particular rents, and rebates (if any) as circumstances may require. I cannot find in this subsection anything which confines the powers of discrimination of the corporation to the matter of rebates. In my view, the changes of particular rents which the corporation may adopt as the method of complying with the duty cast on them by the subsection, include the grading up of the rents of particular tenants or the reducing of the rents of particular tenants as the circumstances may require. Further, the circumstances which may require such variations in the rents of particular tenants, in my view, include the circumstances of the means of tenants of particular houses.

My conclusion is, therefore, that the method of surcharging the tenants of particular houses according to their means which the scheme adopts is not ultra vires, and is within the powers of the corporation.

The other line of attack made on behalf of the plaintiffs on the scheme is that the charges provided for by the scheme are not reasonable charges for the tenancy or occupation of the houses within the meaning of section 83 (1) of the Housing Act, 1936.

The points which have been argued are these: (1) The attempt to regulate an increased weekly rent to be charged by reference to the annual gross income of the tenant is impracticable, particularly when it is not specified (as in the original form of the scheme) what is the yearly period to which reference is to be made. (2) In the case of children or wives who are "wage or "salary earning" must they be resident in the house? And what is meant by "wage or salary earning"? What is the position of such a person who is "self-employed"? Or is on a holiday with pay? Or is unemployed for a period? (3) What is meant by each additional "family"? (4) Who are included in the description "lodgers and subtenants"? (5) In actual practice (it is said) it is found that the discrimination by reference to the supposed means of tenants does not produce a fair and reasonable result, so that in effect tenants with less means are subsidizing other tenants with greater means.

Now, I think that it must be accepted that if unfair inequalities are found to occur in the working of the scheme, this result was far from the intention of the corporation who, in introducing the scheme, were actuated by a desire to temper the inevitable rise in rents to the financial circumstances of their tenants. But it must also be recognized that the scheme is far from perfect, and it may well be that it is not the best kind of scheme to produce the results which the corporation had in mind. The merits of various schemes of this kind were discussed in the fourth report of the housing management sub-committee of the central housing advisory committee (published for the Ministry of Housing and Local Government). This report seems to suggest that there are other methods of dealing with the problems that arise which are more satisfactory than that adopted by the corporation. There certainly are difficulties in operating the corporation's scheme.

Having regard to the obligations of the corporation under the Housing Acts the principle of relating the increases of rent to the income of the tenants does not appear to be unreasonable. Presumably the standard of the tenant's gross annual income was adopted so as to secure some stability in the rents payable under the scheme and to avoid constant detailed changes, which must throw considerable work on the officials of the corporation who have to manage the scheme. The doubt as to the appropriate yearly period seems to have been solved by the reference to the financial year ending on March 31 in the circular of May 31, 1954. It is clear that in law there is no objection to a rent which may fluctuate according to events. *Attorney-General for Ontario* v. *Canadian Niagara Power Co.*[8] and *Ex parte Voisey*[9] are examples of such fluctuating rents. The trouble in the present case is that the weekly rent is to be ascertained not by reference to a weekly standard of income but by reference to an annual standard which cannot be ascertained until the expiration of the current financial year. It is pointed out that a tenant cannot during the progress of the financial year say with certainty in all cases what his actual rent may turn out to be. It is easy to think of cases where tenants, whose basic wage is augmented by a commission or by a bonus, depending on circumstances, or who are self-employed so that their income depends upon the profits of a business, cannot ascertain their gross income for the financial year until on or after the termination of the financial year the amounts receivable by them are revealed. But the impression which I gained from such evidence which was put before me is that the serious theoretical difficulties in the system adopted have not proved to present so many practical problems in fact. In other words, those tenants whose yearly incomes might be likely to exceed £500 or £600 were usually sufficiently well aware of the situation for practical purposes. Another difficulty is presented by borderline cases in which a slight excess of income over the limits selected might cause hardship. An attempt to alleviate these hardships was made in the circular of May 31, 1954, but appears not to be wholly successful.

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[8] [1912] A.C. 852.

[9] (1882) 21 Ch.D. 442.

The doubts whether wives, children or others must be resident in the house in question are not, I think, serious. The answer really appears from the statement appearing in the notification of reassessment of rents and in the conditions of tenancy printed on the rent cards, which informs tenants that "the rent of the "premises is calculated by the city council by reference to a "basic rent and additions thereto based on the tenant's gross "income and the persons residing at the premises." No doubt questions which arise as to the meaning of the words "wage or "salary earning" will have to be solved. Some of these difficulties are probably due to a desire for simplification and economy of words in the statement of the scheme.

Probably the draftsman of the scheme thought that the meaning of the word "family" was perfectly plain, though lawyers who have had anything to do with wills are aware of the uncertainties which may arise from the use of this apparently ordinary and natural word: see the observations of Sir George Jessel M.R. in *Pigg* v. *Clarke*.[10] It is probable that some further elaboration will be necessary to explain the intention of the corporation in using this word in particular circumstances.

Similarly the words "lodger or sub-tenant" may cause difficulties of the kind which have given rise to cases in the law of elections and landlord and tenant. But these difficulties will arise, I apprehend, in a comparatively small number of instances.

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[10] (1876) 3 Ch.D. 672.

I am satisfied from the evidence which was given before me that there are cases where a tenant having an income well below the limits of £500 or £600 per annum will be charged the maximum increase of 12s. 6d. a week. It is, of course, arguable that such persons are contributing unduly to the relief of persons who are in receipt of higher incomes, and, therefore, that the scheme offends against natural justice. But it is probably beyond the scope of human ability to devise a scheme which does not produce some apparent anomalies giving rise to an understandable grievance. The provision of an appeals sub-committee was presumably intended to deal with (amongst others) such hard cases. It may be possible for the council, exercising their discretion on the reports of the sub-committee, to eliminate many of these causes of complaint.

It was said with some force on behalf of the plaintiffs that no attempts had been made to have regard to the outgoings of the household or to the actual earnings of the children of a tenant, and that arbitrary assumptions had been made and arbitrary charges imposed accordingly. These are fair criticisms. There plainly are imperfections. But it may well be that perfection is impossible.

An argument was put forward on behalf of the corporation suggesting that as the management of the houses and the fixing of the rents was a matter for the discretion of the corporation, the court had no power to interfere. In my view, this argument has no substance. The charges to be made by the corporation are required by section 83 of the Housing Act, 1936, to be reasonable charges. It is not sufficient that the corporation have acted in an entirely bona fide manner, and have formed the opinion that the charges are reasonable. If the reasonableness of the charges is challenged, it is necessary for the court to examine the circumstances and to decide whether the charges are reasonable, though the onus of showing that they are not reasonable must rest upon the plaintiffs: *Fattorini (Thomas) (Lancashire) Ld.* v. *Inland Revenue Commissioners*[11] (*per* Lord Atkin, at pp. 656–657); *Nakkuda Ali* v. *M. F. de S. Jayaratne.*[12] I have, therefore, to consider whether the scheme imposes reasonable charges or can be said to be unreasonable.

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[11] [1942] A.C. 643, 656; [1942] 1 All E.R. 619.

[12] [1951] A.C. 66, 76–77; 66 T.L.R. (Pt. 2) 214.

Now I have said already that the scheme is not by any means perfect and that there are provisions which cause difficulties in calculating the rents payable by tenants and there are expressions used which are of doubtful meaning, and there are anomalous cases. It seems to me that as regards doubtful cases, the exhortation to visit the office of the city estates manager is not idle. This is not a case of a code imposing penalties for misdemeanours. It is a case of a document designed to give rise to contractual relationships between landlord and tenant. It seems to me perfectly possible for the contract between the tenant on the one hand and the corporation, as the landlord, on the other hand, to be settled in doubtful cases by discussions between the tenant and an official of the corporation. I do not think that *Howell* v. *Falmouth Boat Construction Co.*[13] (cited on behalf of the plaintiffs) is relevant to this case, which involves contract and not the application of regulations by a government official. So far as the apparent hardships and anomalies are concerned, it seems to me that these imperfections in the scheme, or, indeed, the view that may be formed that there are other and better differential schemes that might have been adopted, are not sufficient to enable me to say that the charges made by the corporation under the scheme for the tenancy or occupation of their houses are not reasonable, and, therefore, that the scheme is void and of no effect.

In the result, therefore, the arguments for the plaintiffs fail on both heads. Tenants naturally are upset when their rents are raised. But an increase in the costs of repairs and maintenance, and, indeed, of wages, may render an increase of rents unavoidable. In this event, the contest is somewhat unreal, if, in any case the local authority may lawfully raise all rents, and then grant rebates in particular cases, thus achieving exactly the same result as when rents are raised in those particular cases where it is thought that the tenants will be able to bear the increases without disaster. On the other hand, as landlords, local authorities are in a privileged position. They have been held to be free from the harassing frustration of the Rent Restriction Acts. It is right and proper that their management of their housing estates should be capable of being challenged in a court of law. But there must be limits to this, or the day to day work of the officials who must carry out the management of the estates would not be practicable. For this reason it seems

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[13] [1951] A.C. 837.

1954

SMITH
v.
CARDIFF
CORPORATION
(No. 2).

Danckwerts J.

to me that imperfections in matters of detail cannot be held to render the particular system which is adopted unreasonable and unlawful. If the corporation in the present case are actuated by the desire to produce the fairest system to their tenants that can be devised (a desire with which I credit them), I conceive that they will feel it their duty to consider the criticisms of their scheme which have been discussed in this case with the object of securing such improvements as circumstances can permit.

The action, therefore, fails.

Judgment for the defendants.

Solicitors: *Wrentmore & Son for Thos. John & Co., Cardiff; Theodore Goddard & Co. for Sydney Tapper Jones, Town Clerk, Cardiff.*

J. L. D.

THOMPSON (W. L.) LD. *v.* ROBINSON (GUNMAKERS) LD.

[1954 W. No. 1351.]

1954
Dec. 8, 9, 10, 13, 14.

Upjohn J.

Damages—Sale of goods—Failure to accept and pay for goods—Delivery of motor-car refused by buyer—Type readily available—Dealer entitled to profit on repudiated sale—Mitigation of damages—"Available market"—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 50 (3).

By section 50 of the Sale of Goods Act, 1893, "(1) Where the "buyer wrongfully . . . refuses to accept and pay for goods, the "seller may maintain an action against him for damages. . . . "(3) Where there is an available market for the goods in question "the measure of damages is prima facie to be ascertained by the "difference between the contract price and the market or current "price. . . ."

The defendant company refused to accept delivery of a "Van-"guard" motor-car which they had contracted to buy from the plaintiffs, who were dealers in motor-cars. The "Vanguard" motor-car was readily available and the retail selling price was fixed by the manufacturers.

The plaintiffs mitigated their damage by returning the vehicle to their suppliers, who took it back, but the plaintiffs contended

1954

Thompson (W. L.) Ld. v. Robinson (Gunmakers) Ld.

that they were nevertheless entitled to damages amounting to £61, the loss of profit on the repudiated sale. The defendants, relying on section 50 (3) of the Sale of Goods Act, 1893, contended that the plaintiffs' loss was only nominal:—

Held, that in these circumstances it was quite plain that the plaintiffs' loss was the loss of their bargain, and, accordingly, applying the principle in *In re Vic Mill Ld.* [1913] 1 Ch. 465, the plaintiffs were entitled to recover £61, their loss of profit, notwithstanding section 50 (3), for there was no "available market" within the meaning of that section, and, moreover, that section provided only a prima facie rule.

Dunkirk Colliery Co. v. *Lever* (1878) 9 Ch.D. 20 and *Marshall & Co.* v. *Nicoll & Son*, 1919 S.C.(H.L.) 129 considered.

Action.

The plaintiffs, W. L. Thompson, Ld., were agents and dealers in new and second-hand cars, who carried on business in Hull. The defendant company, R. Robinson (Gunmakers) Ld. were manufacturers and suppliers of guns, with no interest in the motor trade. The managing director of the defendant company required a motor-car for the business of the company, and it was common ground that on March 4, 1954, the managing director on behalf of the defendant company signed an order for the purchase of a "Vanguard" motor-car from the plaintiffs, an old car being taken in part exchange.

On March 5, 1954, the defendants refused to accept delivery of the "Vanguard" car, and the plaintiffs claimed damages for their loss of profit, amounting to £61. The defendants contended that the damages were only nominal.

The point of principle involved was of importance to the motor-car trade and the action was supported by the British Motor Trade Association; and as it appeared that the defendants' case on the facts might be in jeopardy, the following arrangement in the conduct of the action was approved by Upjohn J.

The defendant company, for the purposes of this action, admitted that there was a binding written agreement for the purchase of the motor-car in question. It was conceded that it was broken the day after it was signed, when the defendant company intimated that it was not prepared to accept delivery of the "Vanguard" motor-car. It was also admitted for the purposes of the action that in the East Riding of Yorkshire (the transaction actually took place in Hull) at the time of the contract of sale there was no shortage of "Vanguard" models to meet all immediate demands in the locality. In return for those concessions the plaintiffs were prepared to indemnify the defendants against their costs of the action.

It was proved first that, in common with other makes of motor-car, dealers were only permitted to sell new "Vanguard" cars at a price fixed from time to time by the manufacturers, the Standard Motor Car Company. If a dealer broke that rule he was put out of business. The dealer's profit on the transaction was also fixed. He would have received in this case a commission of 10 per cent. on the list price of the "Vanguard" and accessories such as wireless and heaters supplied therewith. In this case, the amount of profit he would have made was £61 1s. 9d.

When the defendant company repudiated the transaction on March 5, 1954, the plaintiffs mitigated their damages by rescinding the contract with their supplier. Their supplier was a company called George Thompson Ld., the main distributors for the East Riding, a company closely associated with the plaintiffs. They took back the "Vanguard" car which they had already supplied to the plaintiffs, free of any claim for damages, and later sold the car on May 5, 1954, to another purchaser.

It was also common ground that at this stage the plaintiffs lost a sale in the sense that if another purchaser had come into the plaintiffs' premises there was available for that other purchaser a "Vanguard" car for immediate delivery: so that the effect on the plaintiffs was that they had lost their profit on a sale; having sold one "Vanguard" less than they would otherwise have done. The plaintiffs contended that the true measure of damages in the circumstances was no more and no less than their loss of profit, namely, £61. The defendants said that the loss was nominal, for the plaintiffs could have sold the car to another customer or could do what in fact they did, get their suppliers to release them, and they had thus suffered no damage.

G. T. Aldous and *D. C. Johnson-Davies* for the plaintiffs. The question is the measure of damages which should be awarded to a seller where delivery of a motor-car has been refused; the plaintiffs claim that where, as in this case, the motor-car is one in ready supply and the retail price is fixed, the measure of damages within the meaning of section 50 (2) of the Sale of Goods Act, 1893, is the profit which the plaintiffs would have made on the sale. There is no English reported case on this point, although it has been determined in a number of American and

Dominion cases, where it was held that the seller of a motor-car was entitled to the loss of profit on the repudiated sale. The fundamental principle was laid down in *In re Vic Mill Ld.*,[1] where it was held that the seller of manufactured goods, who had mitigated his loss by selling them to another purchaser, was entitled as damages to the profit which he would have made on the first sale, i.e., he was entitled to the profit both on the repudiated sale and on the sale that he in fact made. *In re Vic Mill Ld.*[1] was followed in *Cameron* v. *Campbell & Worthington Ld.*,[2] a case relating to the repudiated sale of a motor-car which is on all fours with this case. Similar decisions were reached in *Brown* v. *Buck*,[3] *Mason & Risch Ld.* v. *Christner*[4] and *Stewart* v. *Hansen*.[5] That principle should be applied to the present case.

Subsection (3) of section 50 of the Act of 1893 does not apply; there is not in the motor-car trade an " available market " within the meaning of the subsection. " Available market " means some place or centre at or through which a seller can reasonably expect to find a purchaser: see *Dunkirk Colliery Co.* v. *Lever*.[6] Nothing of that nature exists for the sale of a motor-car. Where the purchaser has refused delivery of a motor-car and the seller has mitigated his damages by returning the car to his supplier, his damages amount to his loss of profit on the sale.

J. F. Platts-Mills for the defendants. The plaintiffs have suffered no damage as they have mitigated it by returning the motor-car to the suppliers, who accepted it. It is the duty of plaintiffs to mitigate their damages, and they cannot recover any damage which arises from their failure to do so. The plaintiffs' action was one which a reasonable and prudent man would take in the ordinary course of his business; the doctrine of mitigation of damages obliges them to do that but no more: see *British Westinghouse Electric and Manufacturing Co. Ld.* v. *Underground Electric Railways Co. of London Ld.*[7]

The defendants further rely on section 50 (3) of the Act; for that defence they must prove: (1) that there was no difference between the contract price and the market price—that must be so when the retail price is fixed by the manufacturers throughout the trade; (2) that there was an " available market " for these goods; there cannot be market price unless there is an available

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[1] [1913] 1 Ch. 465.

[2] [1930] S.A.S.R. 402.

[3] [1934] 4 D.L.R. 446.

[4] (1920) 48 O.L.R. 8; 54 D.L.R. 653.

[5] (1923) 44 A.L.R. 340.

[6] (1878) 9 Ch.D. 20, 25.

[7] [1912] A.C. 673.

1954

THOMPSON (W. L.) LD. *v.* ROBINSON (GUNMAKERS) LD.

market. What is meant by market price depends on the particular circumstances, and the fact that the price was fixed does not prevent there being a market price: *Charrington & Co. Ld.* v. *Wooder.*[8]

The meaning of the word "market" has changed from its original meaning of a fair or market where people actually came to buy and sell goods. In *Charrington & Co. Ld.* v. *Wooder*[8] Lord Dunedin said[9] that it was a term of no fixed legal significance. Lord Kinnear in that case said[10] that it might be a technical term, that it might mean a place set apart for trading, or might mean simply purchase and sale; in either sense there were innumerable markets each with its own customs and conditions. It is particularly important in connexion with commercial law that the law should be kept in touch with modern usage. The definition of "available market" given in *Dunkirk Colliery Co.* v. *Lever*[11] is inadequate in modern conditions. The cases show that the meaning of "market" has changed; it has now come to signify the whole structure of buying and selling in a particular trade, and must extend to all possible purchasers and sellers. [Reference was made to *Orchard* v. *Simpson*[12]; *Wertheim* v. *Chicoutimi Pulp Co.*[13]; *Lesters Leather and Skin Co. Ld.* v. *Home and Overseas Brokers Ld.*[14] and *Ellesmere (Earl)* v. *Inland Revenue Commissioners.*[15]]

There appears to be no other reported case on the meaning of "available market" in section 50 (3), but in *Marshall & Co.* v. *Nicholl & Son*[16] it was held that "available market" in section 51 (3) extended to the case of goods which were not kept in stock, were not purchasable in the open market and were made to a particular specification. That interpretation applies equally to section 50 (3), and on that interpretation there is an "available "market" in these goods; the plaintiffs are not therefore entitled to damages, or at the most are entitled only to nominal damages.

Aldous in reply. The first question is what is in fact the damage suffered by the plaintiffs; if they suffered none they get none; but the repudiation of the motor-car lost them £61 profit, as they sold one car less than they would have done.

The interpretation of section 51 (3) cannot be applied to section 50 (3); there is a great difference between a market from

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[8] [1914] A.C. 71; 30 T.L.R. 176.

[9] [1914] A.C. 71, 82.

[10] Ibid. 80.

[11] 9 Ch.D. 20.

[12] (1857) 2 C.B.N.S. 299.

[13] [1911] A.C. 301.

[14] [1948] W.N. 437; 64 T.L.R. 569.

[15] [1918] 2 K.B. 735; 34 T.L.R. 560.

[16] 1919 S.C.(H.L.) 129.

1954

THOMPSON (W. L.) LD. v. ROBINSON (GUNMAKERS) LD.

the point of view of a seller and that of a buyer. If goods are in current supply, a buyer is free to go anywhere where the goods may be found, whether retail or wholesale, and buy them; but a seller may have difficulty in disposing of goods unless there is some place or medium in or by which he can dispose of them. Therefore the same standards cannot be applied, and *Marshall & Co.* v. *Nicholl & Son* [16] is no guide to this case, and the meaning given to " available market " in *Dunkirk Colliery Co.* v. *Lever* [17] should be adopted.

In the present circumstances of the motor-car trade, although a " Vanguard " motor-car is readily obtainable by any purchaser who wants one, there is not an unsatisfied market ready to absorb any motor-cars which are placed on the market. For that reason, although there may be an " available market " within section 51 (3), there is not an " available market " within the meaning of section 50 (3), and the plaintiffs are entitled to succeed on their claim for loss of profit.

UPJOHN J. This action raises a question of some importance to the motor trade as to the true measure of damages where the buyer of a motor-car, in this case a Standard "Vanguard," refuses to complete his bargain and take delivery.

[His Lordship stated the facts and continued:] The law is not really in doubt; it is set out in section 50 of the Sale of Goods Act, 1893.[1] That section was declaratory of the existing law, and the general principle which has been observed in all cases I take conveniently from the speech of Lord Haldane in *British Westinghouse Electric and Manufacturing Co. Ld.* v. *Underground Electric Railways Co. of London Ld.*,[2] where he said this [3]: " Subject to these observations I think that there are certain " broad principles which are quite well settled. The first is that, " as far as possible, he who has proved a breach of a bargain

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[16] 1919 S.C.(H.L.) 129.

[17] 9 Ch.D. 20.

[1] Sale of Goods Act, 1893, s. 50: " (1) Where the buyer wrongfully " neglects or refuses to accept and " pay for the goods, the seller may " maintain an action against him for " damages for non-acceptance. (2) " The measure of damages is the " estimated loss directly and naturally " resulting, in the ordinary course of " events, from the buyer's breach of " contract. (3) Where there is an " available market for the goods in " question the measure of damages " is prima facie to be ascertained by " the difference between the contract " price and the market or current " price at the time or times when the " goods ought to have been accepted, " or, if no time was fixed for acceptance, then at the time of the refusal " to accept."

[2] [1912] A.C. 673.

[3] Ibid. 689.

" to supply what he contracted to get is to be placed, as far as " money can do it, in as good a situation as if the contract had " been performed." That is the general rule.

Apart altogether from authority and statute it would seem to me on the facts which I have to consider to be quite plain that the plaintiffs' loss in this case is the loss of their bargain. They have sold one " Vanguard " less than they otherwise would. The plaintiffs, as the defendants must have known, are in business as dealers in motor-cars and make their profit in buying and selling motor-cars, and what they have lost is their profit on the sale of this " Vanguard." There is no authority exactly in point in this country, although it seems to me that the principle to be applied is a clear one. It is to be found in *In re Vic Mill Ld.*[4] In that case the supplier was to supply certain machines which he had to make, and they were to be made to the particular specification of the purchaser although they were of a type generally in common use. It was not the present case of a sale by a motor-dealer of a standardized product. The purchaser repudiated his order, and with a view to mitigating damages the supplier, on getting another order for somewhat similar machinery, very sensibly made such alterations as were necessary to the machinery that he had made for the original purchaser and sold the machinery so altered to the second purchaser. His costs of doing that were comparatively trivial. It was said by the supplier that the measure of his damages was the loss of his bargain; by the purchaser that the measure of damages was merely the cost of the conversion of the machinery for the second purchaser and his slight loss on the re-sale. Hamilton L.J., after setting out the facts, said this[5]: " That was a reasonable mode " of mitigating the damages, but it by no means follows that " the damages are confined to the cost, a trivial one, of adapting " the machines to the needs of the second customer, and the loss " on resale to him, which was only £23, making £28 in all. The " fallacy of that is in supposing that the second customer was " a substituted customer, that, had all gone well, the makers " would not have had both customers, both orders, and both " profits. In fact, what they did, acting reasonably, and I think " very likely more than reasonably in the interests of the Vic " Mill, was to content themselves with earning the profit on the " second contract at the cost of adapting the machines, which " has been taken at £5; but they are still losers of the profit

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[4] [1913] 1 Ch. 465.

[5] Ibid. 473.

" which they would have made on the Vic Mill contract, because " they could, if they had been minded, have performed both the " contracts, and have made the profit on both the contracts but " for the breach by the Vic Mill Company of their contract."

Buckley L.J. put the matter succinctly in this way [6]: " As " regards No. 1, where the goods were manufactured, the respondents are, I think, entitled to both profits, because they were " not bound to give the appellants the benefit of another order " that the respondents had received. The respondents were left " with these goods on their hands. They altered them and sold " them to another buyer, but they could have made, and would " otherwise, I suppose, have made, other goods for that buyer, " and not employed these goods for that purpose. If they had " done so, they would have made both profits."

It seems to me that in principle that covers this case. True, the motor-car in question was not sold to another purchaser, but the plaintiffs did what was reasonable, they got out of their bargain with George Thompson Ld., but they sold one less " Vanguard," and lost their profit on that transaction. *In re Vic Mill Ld.*[7] has been followed and applied to exactly the circumstances I have before me, that is to say, the sale of a motor-car, in a number of cases abroad to which I have been referred. In *Cameron* v. *Campbell & Worthington Ld.*,[8] a judgment of the Supreme Court of the State of South Australia, the headnote reads: " Where a purchaser of a motor-truck chassis from a dealer " refused to accept delivery of the motor-truck, which was then " re-sold at a profit, there being evidence that similar motor-" trucks were available for immediate delivery, and the property " not having passed. Held, that the seller was entitled to retain " the profit on re-sale, and also to damages for loss of profit on " the original sale. *In re Vic Mill* [9] followed."

Then there was *Mason & Risch Ld.* v. *Christner*,[10] a decision of the appellate division of the Supreme Court of Ontario, and they came to a similar conclusion. That case was followed in *Brown* v. *Buck*,[11] and the same result has been reached in the United States in a rather earlier case, *Stewart* v. *Hansen*,[12] a decision of a majority of the Supreme Court of Utah.

The main case, however, put by the defendants is this: they submit that subsection (3) of section 50 applies, because they say that there is an available market for the goods in question, and in that available market we know that the price of the "Vanguard" is fixed. It is fixed by the manufacturers. Therefore, they say, the measure of damages must necessarily be little more than nominal. Had the plaintiffs kept the car and sold it to another at a later stage, no doubt they would have been entitled to the costs of storage in the meantime, possibly interest on their money laid out, and so on, but as they had in fact mitigated their damages by getting out of the contract, damages are nil.

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[6] [1913] 1 Ch. 465, 474.

[7] [1913] 1 Ch. 465.

[8] [1930] S.A.S.R. 402.

[9] [1913] 1 Ch. 465.

[10] (1920) 48 O.L.R. 8; 54 D.L.R. 653.

[11] [1934] 4 D.L.R. 446.

[12] (1923) 44 A.L.R. 340.

Mr. Platts-Mills said that the market now must not be treated as a market or fair in a limited or technical sense. It is curious that there is a comparative absence of authority on the meaning of the phrase "available market," because one would have thought that there would have been many cases, but the researches of counsel have only disclosed one authority on section 50 (3). It is *Dunkirk Colliery Co.* v. *Lever*,[13] a decision of the Court of Appeal. The facts were far removed from the facts before me, and I need not recite them; it will be sufficient if I read an extract from the judgment of James L.J., who said[14]: "Under those circumstances the only thing that we "can do is to send it back to the referee with an intimation "that we are of opinion upon the facts (agreeing with the "Master of the Rolls in that respect), that the facts do not "warrant the application of the principle mentioned in the "award, namely, that there was what may be properly called a "market. What I understand by a market in such a case as "this is, that when the defendant refused to take the 300 tons "the first week or the first month, the plaintiffs might have "sent it in waggons somewhere else, where they could sell it, "just as they sell corn on the Exchange, or cotton at Liverpool: "that is to say, that there was a fair market where they could "have found a purchaser either by themselves or through some "agent at some particular place. That is my notion of the "meaning of a market under those circumstances."

If that be the right principle to apply, it was proved that there is nothing in the nature of a market like a Cotton Exchange or Baltic or Stock Exchange, or anything of the sort, for the sale of new motor-cars. But Mr. Platts-Mills submitted that the word "market" is of no fixed legal significance. That, I think, is so, and was so stated by Lord Dunedin in *Charrington & Co.*

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[13] (1878) 9 Ch.D. 20.

[14] Ibid. 24, 25.

Ld. v. *Wooder.*[15] Mr. Platts-Mills said that the meaning of the word must move with the time. In an interesting speech tracing the history of the contract of sale and purchase he pointed out that whereas originally all transactions were carried out in markets or fairs purely by barter and then later for a money consideration, it was only quite recently that other forms of dealing have come to be familiar. He reminded me that as recently as the year 1812 Sir James Mansfield C.J. pointed out that a sale by sample was a novel thing, and he (Mr. Platts-Mills) said that now one must really look on the market as the whole conspectus and complex of the selling structure of any trade and of the whole purchasing public. Every farmer, he instanced, is a part of the market in agriculture, and he said that, there being an available market, the damages must necessarily be nominal for the reasons which I have mentioned.

It is curious that in section 51 (3) of the Sale of Goods Act (a subsection in identical terms with section 50 (3)), which relates to the remedies of the buyer when the seller defaults, a somewhat different view of the word " market " has been taken from that expressed by James L.J. The only case to which I have been referred is *Marshall & Co.* v. *Nicoll & Son,*[16] a decision of the Court of Session which went to the House of Lords. The headnote of the report of the case in the House of Lords [16] is as follows: " In an action of damages for failure to deliver a " consignment of annealed steel sheets, the Second Division— " holding that there was an ' available market ' for the sheets " within the meaning of the Sale of Goods Act, 1893, section " 51 (3), although they were not kept in stock and were not " purchasable in the open market but were specially made to " specification—awarded to the purchasers as damages for the " sellers' failure to deliver the goods a sum representing the " difference between the contract price and the price current " at the time of the refusal to deliver. On appeal the House " of Lords *affirmed* the award; Viscount Finlay, however, being " of opinion that, on the evidence, it had not been established " that there was an ' available market ' for the goods, but that " the sum awarded should stand as representing damages assessed " on the basis of what the goods, if delivered, would have been " worth to the purchasers. *Observations* by Lord Shaw of " Dunfermline on the method of assessing damages where purchasers have failed to prove an ' available market.' " The situation seems to have been this, that Lord Finlay held there was no market on the facts; Lord Cave held that although there was not a market in the narrow sense, there were facts upon which the Lord Ordinary could have found that there was an available market, and with that Lord Dunedin apparently concurred. On the other hand, Lord Shaw when he came to deliver his speech agreed with Lord Finlay.

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[15] [1914] A.C. 71, 82; 30 T.L.R. 176.

[16] 1919 S.C.(H.L.) 129.

I think that in that state of affairs the decision of the Court of Appeal in *Dunkirk Colliery Co.* v. *Lever*[17] is binding on me, and, therefore, unless something is to be found in the nature of a market in the sense used by James L.J., subsection (3) has no further application. However, the point seems to me of somewhat academic interest in this case because if the word " market " is given an extended meaning, in my view on the facts I have to consider a precisely similar result is reached.

Had the matter been res integra I think that I should have found that an " available market " merely means that the situation in the particular trade in the particular area was such that the particular goods could freely be sold, and that there was a demand sufficient to absorb readily all the goods that were thrust on it, so that if a purchaser defaulted, the goods in question could readily be disposed of. Indeed, such was the situation in the motor trade until very recently. It was, of course, notorious that dealers all over the country had long waiting lists for new motor-cars. People put their names down and had to wait five or six years, and whenever a car was spared by the manufacturer from export it was snatched at, and if any purchaser fell out there were many waiting to take his place, and it was conceded that if those circumstances were still applicable to the " Vanguard " motor-car the claim for damages must necessarily have been purely nominal. But on the assumed facts circumstances had changed in relation to " Vanguard " motor-cars, and in March of this year there was not a demand in the East Riding which could readily absorb all the " Vanguard " motor-cars available for sale. If a purchaser defaults, that sale is lost, and there is no means of readily disposing of the " Vanguard " contracted to be sold so that there is not even on the extended definition an available market. But there is this further consideration: even if I accepted Mr. Platts-Mills's broad argument that one must now look at the market as being the whole conspectus of trade, organization and marketing, I have to remember that subsection

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[17] 9 Ch.D. 20.

(3) provides only a prima facie rule, and if on investigation of the facts one finds that it is unjust to apply that rule, in the light of the general principles mentioned above, then it is not to be applied. In this case, as I said in the earlier part of my judgment, it seems to me plain almost beyond argument that in fact the loss to the plaintiffs is the sum of £61. Accordingly, however one interprets subsection (3), it seems to me on the facts that I have to consider one reaches the same result.

There will be judgment for the plaintiffs for £61 1s. 9d., but the order must incorporate an undertaking by the plaintiffs to indemnify the defendants against their costs of this action.

There must be a mutual set-off between the costs and the sum of £61.

Judgment for the plaintiffs.

Solicitors: *Osmond, Bard & Westbrook; Smith & Hudson for Williamson, Stephenson & Hepton, Hull.*

I. G. R. M.

1954
June 23, 24.
Upjohn J.

In re WHITE'S WILL TRUSTS.
BARROW AND ANOTHER *v.* GILLARD AND ANOTHER.

[1953 W. 4536.]

Charity—Practicability—Bequest—Whether bequest practicable—Form of inquiry.

A testatrix by her will provided: "The two cottages Kidbrook "and Gretna to be used as missionary homes—Mr. B. . . . also "Mr. S. . . . both know my wish how they are to be used Rest "Homes for retired aged Missionaries." The cottages Kidbrook and Gretna were at the date of this summons occupied by tenants entitled to the protection of the Rent Restriction Acts and there was no indication that any of them proposed or would become liable to leave:—

Held, that the gift constituted a valid charitable gift. It being conceded, however, that there was no general or paramount charitable intention and that, if the testatrix's particular charitable purpose could not be carried out, the gift failed and the cottages fell into residue, the residuary legatee was entitled to an inquiry as to the practicability of the gift, to take the form "whether at "the date of the death of the testatrix it was practicable to carry "the intentions of the testatrix into effect or whether at the said "date there was any reasonable prospect that it would be practicable "to do so at some future time." If there was no such reasonable prospect the residuary legatee was entitled to the cottages, since it would be wrong to keep the matter in suspense indefinitely.

Form of inquiry directed in *In re James* [1932] 2 Ch. 25; 48 T.L.R. 250 and *In re Wright* [1954] Ch. 347; [1954] 2 All E.R. 98 disapproved.

1954

WHITE'S WILL TRUSTS, *In re.* BARROW *v.* GILLARD.

ADJOURNED SUMMONS.

By a testamentary document duly executed and dated August 30, 1940, Caroline Matilda White (hereinafter called "the testatrix") appointed the first plaintiff on this summons and her brother John Matthew Gillard, the first defendant, executors and trustees thereof and, after a specific devise, devised and bequeathed the residue of her property to her brothers the said John Matthew Gillard and Charles Gillard. On March 24, 1949, Charles Gillard died. By a further testamentary document duly executed and dated February 12, 1952, the testatrix provided, inter alia: "The two cottages Kidbrook and Gretna to be used "as missionary homes—Mr. Bell Green Brae Wimborne also "Mr. Harry Scott 31 Danecourt Road Parkstone they both know "my wish how they are to be used Rest Homes for retired aged "Missionaries." On September 16, 1952, the testatrix died. By an order dated March 11, 1953, and made by Davies J. in the Probate Division, it was ordered that both documents be admitted to probate as together constituting the testatrix's last will and testament, and on May 12, 1953, they were duly proved by the plaintiffs on this summons.

At the date of this summons the cottages were occupied by tenants entitled to the protection of the Rent Restriction Acts and there was no indication that any of them either proposed or would become liable to leave. Communication with Bell and Scott elicited the information that the "Retired Missionary "Aid Fund," of which Bell was treasurer and correspondent, requested that Kidbrook be sold and the proceeds of sale handed over to them; and that the trustees of the "Bournemouth Mis-"sionary Homes," of which Scott was secretary, wished that Gretna might be conveyed to them with a view to their collecting the rents and managing it for the benefit of their association and ultimately, when vacant possession of it could be obtained, using it as a missionary home.

By this summons, taken out on December 29, 1953, the executors and trustees of the will asked (1) whether the direction in the document of 1952 that the cottages be used as missionary

1954

WHITE'S WILL TRUSTS, *In re.* BARROW *v.* GILLARD.

homes and other directions therein relating to them constituted a valid charitable gift; (2) if so, whether, having regard to existing circumstances, it could be carried out wholly or in part, and if or to the extent that it could not, whether the gift failed or ought to be administered cy-près; (3) that if and so far as necessary a scheme for the administration of the gift might be settled and so far as necessary or expedient the retention of the cottages be sanctioned under section 8 of the Mortmain and Charitable Uses Act, 1891.

C. D. Myles for the plaintiffs.

R. S. Lazarus (*T. A. C. Burgess* with him) for the residuary legatee. There is no general or paramount charitable intention in this case. If the court holds that the directions relating to the cottages constitute a valid charitable gift, it should hold also that the residuary legatee is entitled to an inquiry whether it is practicable to effectuate that gift.

The matter is not free from authority. In *Attorney-General* v. *Bishop of Chester*[1] it was held that a legacy towards establishing a bishop in Canada was not void, even though a bishop had not yet been appointed, and that a legacy to repair a parsonage house was good; and the fund was paid into court pending an inquiry as to practicability. In *Attorney-General* v. *Ironmongers' Co.*[2] a residuary estate was given to trustees who were not to lessen the capital or to apply the interest and profits otherwise than as directed. One moiety was directed to be applied for a charitable purpose which failed, the other for specific charitable purposes, and it was held that there was jurisdiction to apply the former moiety cy-près. In *Sinnett* v. *Herbert*[3] it was held that a gift for the endowment of a future church was not void, and doubt was expressed whether the court would withhold for an indefinite time, or would direct the application cy-près of, a fund given for a charitable object which there was no reasonable prospect of carrying into execution. In *In re White's Trusts*,[4] which was concerned with a trust for the building of almshouses, the trustees tried to obtain a site for the almshouses, but their endeavours proved unsuccessful and there appeared to be no reasonable prospect of any such site being obtained, and it was held that as the object of the gift had failed the fund fell into residue as a lapsed legacy and was not applicable cy-près. In *Wallis* v. *Solicitor-General for New Zealand*[5] it was held that an express gift of land and money for particular purposes was not invalidated by the fact that the particular application directed would not necessarily take place within any definite time and might never do so, and that the doctrine of cy-près applied. In *In re Wilson*[6] it was held that a gift for a school fell within the class of cases where, on the true construction of the will, no paramount general charitable intention could be inferred but the gift was for a particular charitable purpose and, because it was impossible to carry out that purpose, failed altogether. In *In re Monk*,[7] where the gift was for "loans to poor and deserving "inhabitants" of a parish, it was held that there was a general charitable intention and an immediate and effective gift of the residuary estate to charity, displacing the next-of-kin; that the possibility of a surplus thereafter did not impair the validity of an immediate gift to charity; and that the doctrine of cy-près could be at once applied, if necessary, to any surplus income after the period allowed by law for accumulation had expired; and *In re Wilson*[8] was distinguished. In *Blackwell* v. *Blackwell*,[9] where the testator's trusts in a codicil were that the persons designated should apply the income of a fund "for the purposes "indicated by me to them," it was held that oral evidence was admissible to establish the trust and that a complete valid trust was established by the codicil and a memorandum of even date. In *In re James*[10] there was a trust for a home of rest and an inquiry was directed in the form "whether it is or will be at any "time practicable to establish a home such as this." In *In re Wright*[11] Wynn-Parry J. directed an inquiry in like terms. In both cases the course taken by the court in *Attorney-General* v. *Bishop of Chester*[12] and in *Sinnett* v. *Herbert*[13] and the observations of Lord Hatherley L.C. in the latter case appear not to have been followed or applied.

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[1] (1785) 1 Bro.C.C. 444.

[2] (1834) 2 My. & K. 576.

[3] (1872) 7 Ch. 232.

[4] (1886) 33 Ch.D. 449; 2 T.L.R. 830.

If, in the present case, the court holds that the directions relating to the cottages constitute a valid charitable gift, it ought also to hold that the residuary legatee is entitled to an inquiry as to practicability, and in view of *Attorney-General* v. *Bishop of*

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[5] [1903] A.C. 173; 19 T.L.R. 230.

[6] [1913] 1 Ch. 314.

[7] [1927] 2 Ch. 197; 43 T.L.R. 256.

[8] [1913] 1 Ch. 314.

[9] [1929] A.C. 318; 45 T.L.R. 208.

[10] [1932] 2 Ch. 25; 48 T.L.R. 250.

[11] [1954] Ch. 347; [1954] 2 All E.R. 98.

[12] 1 Bro.C.C. 444.

[13] L.R. 7 Ch. 232.

1954

WHITE'S WILL TRUSTS, *In re.* BARROW *v.* GILLARD.

Chester [14] and *Sinnett* v. *Herbert* [15] that inquiry ought to be whether it will be practicable, not " at any time," but " within " a reasonable time."

Denys Buckley for the Attorney-General. It is conceded that there is no general or paramount charitable intention and that if the testatrix's particular charitable purpose cannot be carried out the gift fails. On the authorities, however, the court can and ought to hold that the directions constitute a valid charitable gift. The inquiry as to practicability can be appropriately and adequately framed on the basis of the statement of facts in *In re White's Trusts,* [16] from which it emerges that there appeared to be " no reasonable prospect " of a site of the kind envisaged being obtained. Thus, the inquiry could be whether it was possible to carry out the testatrix's intentions at the date of her death, or whether at that date there was " any reasonable prospect " that it would be practicable to do so in future.

UPJOHN J., having decided that the gift of the two cottages contained in the second testamentary document dated February 12, 1952, constituted a valid charitable gift, continued: It has been conceded that there is no general or paramount charitable intention and that, if the particular charitable purpose of the testatrix cannot be carried out, the gift fails and the cottages fall into residue. Both cottages are at present let to tenants who claim the benefit of the Rent Restriction Acts, but there is some evidence to the effect that an existing body would be willing to take over one of the cottages, at any rate, and use it for the purpose mentioned in the testamentary document when they can obtain possession. The first defendant, the residuary legatee, is in those circumstances entitled to have an inquiry as to the practicability of carrying the gift into effect. There has been a useful discussion before me as to the form which that inquiry should take.

Reference has been made to the form of inquiry directed in *In re James,* [1] which appears to have been followed by Wynn-Parry J. in *In re Wright.* [2] In neither case does there appear to have been any argument on the form of the inquiry, which was in these terms: " to inquire whether it is or will be at any future " time practicable to establish a home such as this." I do not think that that form is satisfactory. Where a particular purpose is indicated in a will, it cannot be right to extend an inquiry into the possibility of carrying it out to an indefinite time in the future. Moreover, in many cases it will be impossible to answer the inquiry. There are many cases where funds have been paid into court until it was seen whether or not a certain purpose became practicable. The earliest of such cases is *Attorney-General* v. *Bishop of Chester.*[3] Ultimately the gift was applied for a bishop in Canada. In *Sinnett* v. *Herbert*[4] Lord Hatherley L.C. expressed doubts, with which I respectfully agree, whether it was right to keep property given on charitable trusts in suspense indefinitely. After referring to *Attorney-General* v. *Bishop of Chester*[5] he said[6] " . . . the court did not direct any application " of the fund according to the *cy-près* doctrine; it would not allow " the fund to be dealt with immediately, but directed the fund " to remain in hand for a time with liberty to apply, because it " was not known whether any bishop would be established. But " that the court would continue to retain it for ever, waiting " until a bishop should be appointed, I think is a very doubtful " proposition."

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[14] 1 Bro.C.C. 444.

[15] L.R. 7 Ch. 232.

[16] 33 Ch.D. 449; 2 T.L.R. 830.

[1] [1932] 2 Ch. 25; 48 T.L.R. 250.

[2] [1954] Ch. 347; [1954] 2 All E.R. 98.

Counsel for the Attorney-General, basing himself on some words to be found in the statement of facts in *In re White's Trusts,*[7] has suggested a formula which is acceptable to counsel for the first defendant, and which seems to me to put the matter on a more satisfactory basis, namely, an inquiry " whether at the " date of the death of the testatrix it was practicable to carry " the intentions of the testatrix into effect or whether at the " said date there was any reasonable prospect that it would be " practicable to do so at some future time." If there be no such reasonable prospect, the residuary legatee is entitled to the two cottages. It would not be right to keep the matter in suspense indefinitely and I direct an inquiry accordingly.

Order accordingly.

Solicitors: *Peacock & Goddard for Mooring Aldridge & Haydon, Christchurch, Hants; Treasury Solicitor.*

K. R. A. H.

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[3] (1785) 1 Bro.C.C. 444.

[4] (1872) L.R. 7 Ch. 232.

[5] 1 Bro.C.C. 444.

[6] L.R. 7 Ch. 232, 240.

[7] (1886) 33 Ch.D. 449; 2 T.L.R. 830.

1954
Nov. 10, 11;
Dec. 8.

Harman J.

In re MAKEIN, DECD.
MAKEIN *v.* MAKEIN AND ANOTHER.

[1954 M. 2120.]

Family Provision—Children—Illegitimate child—Application for maintenance—Intestacy—Claim to be illegitimate son of the intestate—Whether a dependant within the Act—Inheritance (Family Provision) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 45)*—Intestates' Estates Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 64).

Legitimacy — Family provision. "Child." "Son." "Issue." "Family."

An illegitimate son is not a dependant within the meaning of the Inheritance (Family Provision) Act, 1938, s. 1 (1).[1]

M. died intestate on June 12, 1953, and accordingly the devolution of his estate was governed by the Intestates' Estates Act, 1952,[1] which amended the Inheritance (Family Provision) Act, 1938, and extended its application to cases of intestacy.

The plaintiff, an infant, applying by his next friend, his mother (a feme sole), took out a summons under the Inheritance (Family Provision) Act, 1938, asking that provision be made for him out of the intestate's estate, the plaintiff claiming to be a natural son of the intestate. The question whether a natural son was a dependant within the meaning of the Act was adjourned into court

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[1] Intestates' Estates Act, 1952, Part I (ss. 1 to 6), "Amendments "of Law of Intestate Succession"; Part II (ss. 7, 8), "Amendments of "Inheritance (Family Provision) Act, "1938."

S. 1: "(1) As respects a person "dying intestate after the commence-"ment of this Act sections 46, 47 and "48 of the Administration of Estates "Act, 1925 . . . shall have effect "subject to the amendments set out "in this section."

S. 7: "As respects a person dying "after the commencement of this Act, "the Inheritance (Family Provision) "Act, 1938, shall have effect subject "to the amendments set out in the "Third Schedule to this Act (being "amendments for the purpose of— "(*a*) extending that Act to cases "where persons die intestate, . . .)."

S. 9 (2): "This Act shall come "into operation on the first day of "January, nineteen hundred and "fifty-three."

Inheritance (Family Provision) Act, 1938 (as amended by Intestates' Estates Act, 1952, s. 7, Sch. III), s. 1 (1): "Where . . . a person "dies . . . leaving . . . (*c*) an infant "son . . . , then, if the court on "application by or on behalf of any "such . . . son as aforesaid (in this "Act referred to as a 'dependant' "of the deceased) is of opinion that "the disposition of the deceased's "estate effected by his will, or the "law relating to intestacy, or the "combination of his will and that "law, is not such as to make reason-"able provision for the maintenance "of that dependant, the court may "order that such reasonable provision "as the court thinks fit shall . . . "be made out of the deceased's net "estate for the maintenance of that "dependant: . . ."

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

1954

MAKEIN, DECD., *In re.* MAKEIN *v.* MAKEIN.

as a preliminary point of law without any case stated or evidence filed.

On the assumption that the plaintiff would be able to prove one or more of the following facts: (*a*) that he was a natural son of the intestate; (*b*) that he had been acknowledged as such in the intestate's lifetime; and (*c*) that he had been treated as one of the intestate's family:—

Held, that an illegitimate son, whether brought up as a member of the family or not, had no claim under the Act of 1938, as amended by the Act of 1952.

ADJOURNED SUMMONS.

Alfred Makein died intestate on June 12, 1953, and, accordingly, the devolution of his estate was governed by the Intestates' Estates Act, 1952. On January 21, 1954, a grant of administration was made in favour of the intestate's widow, the first defendant, and his lawful son, the second defendant.

On June 4, 1954, the plaintiff, an infant, applying by his next friend, styling herself Betty Leventhal (feme sole) took out the present summons entitled in the matter of the intestate's estate and the Inheritance (Family Provision) Act, 1938, asking that provision be made for him out of the intestate's estate he being a natural son of the intestate. According to the plaintiff's birth certificate, he was born on February 13, 1946, a son of the intestate and of the next friend.

On the first appointment before the master, the defendants put in issue the question of the plaintiff's paternity and further took the point that even if the plaintiff proved to be that which he claimed in the summons, namely, the natural son of the intestate, he was, nevertheless not a dependant within the meaning of the Act. Accordingly, leave was given to amend the summons by asking for a declaration that the plaintiff was such a dependant, and this issue, the subject of this report, was adjourned into court as a point of law without any case stated or evidence filed, under R.S.C., Ord. 34, r. 2.

J. F. F. Platts-Mills for the plaintiff. The plaintiff, an infant, claims to be the natural son of the intestate, and a dependant within the meaning of section 1 (1) of the Inheritance (Family Provision) Act, 1938, as amended by the Intestates' Estates Act, 1952. The argument in *Bosch* v. *Perpetual Trustee Co.*[2] sets out the history of similar legislation in New Zealand and the Australian states. The object of this class of legislation is the protection of

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[2] [1938] A.C. 463, 465.

1954

MAKEIN, DECD., *In re.* MAKEIN *v.* MAKEIN.

the family. The English Act has the word "family" as part of its short title. By section 1 of the Act of 1938 as amended the persons who may apply to the court for maintenance under the terms of the Act are described collectively as "dependants." It is a proper inference, therefore, that the court is entitled to protect dependants of the deceased. By virtue of section 1 (1) (*c*) the court may order that reasonable provision be made for the maintenance of an infant son of a deceased person if the court is of opinion, inter alia, that the law relating to intestacy is not such as to make reasonable provision for his maintenance. This is a most apt provision to benefit a natural son, who takes nothing under the law of intestacy in respect of the estate of his putative father.

It is significant that the legislature has used the words "son" and "daughter" in this Act in preference to the words "children" or "issue." There is a rule of law that prima facie the latter words refer only to legitimate children and issue, but there is no such rule in connexion with the words "son" and "daughter." It is true that section 5 of the Act provides that the words "son" and "daughter" in the Act include a male or female child adopted by the deceased under the Adoption Act, 1926. It might therefore be thought that since the section specifically extends the word "son" to include an adopted son, it thereby, by implication, excludes an illegitimate son, but it is submitted that the section does not have that effect. In *In re Joslin* [3] Farwell J. held that the court, in exercising its discretion under the Act, was entitled to take into consideration the claims of the illegitimate children of the testator.

In the last 100 years there has been a marked change in public opinion in respect of its attitude towards the position of illegitimate children in society, and the following examples illustrate this trend. Under the provisions of Lord Campbell's Act, 1846, it was held that the word "child" did not include an illegitimate child. The law was altered in this respect by section 2 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, which enlarges the word "child" in the Act of 1846 so as to include an illegitimate child. By section 4 of the Workmen's Compensation Act, 1925, dependants are by definition to include illegitimate children; see also section 8 of that Act. By section 9 of the Legitimacy Act, 1926, a natural child may succeed to his mother's property if she dies leaving no lawful issue. The Births and

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[3] [1941] Ch. 200.

Deaths Registration Act, 1947, provides for the issue of birth certificates which do not disclose that the child whose birth is registered thereon is illegitimate. It is plain, therefore, that the construction which the plaintiff seeks to place upon the word "son" in the Act of 1938 is consonant with the trend of modern legislation, which is designed to alleviate the position of the illegitimate child.

Reliance is also placed on the fact that the Act is, as its short title discloses, a "family" provision Act. The word "family" is not necessarily confined to legitimate children. In *Humble* v. *Bowman*,[4] where there was a power to appoint among the "family," it was held that an illegitimate child, whom the testator had recognized as his child, was an object of the power. It is submitted that any word meaning offspring, which also in its context is equivalent to the word family or the word dependant, has a meaning wide enough to include illegitimate child. For the purposes of the Rent Restrictions Acts an illegitimate child is a member of the family of the statutory tenant, and, accordingly, if he is residing with the tenant at the time of the tenant's death, he may be entitled to the protection afforded by the Acts: see *Brock* v. *Wollams*,[5] *per* Bucknill and Denning L.JJ.

In *Gammans* v. *Ekins* [6] Asquith L.J. accepted the contention that membership of the same "family" includes relationships whereby one person becomes in loco parentis to another. Accordingly, a natural son who is recognized and provided for by his putative father thereby becomes a member of his father's family. It follows that such a son is within the meaning of the word "dependant" as used in the Act of 1938, and that it colours the word "son" in section 1 (1) to the extent of including by implication a natural son. [Reference was also made to *In re Perowne* [7]; *Standingford* v. *Probert* [8]; *Fowkes* v. *Pascoe* [9]; *Braintree Union* v. *Rochford Union* [10]; *Guardians of Woolwich Union* v. *Guardians of Fulham* [11]; *Morris* v. *Britannic Assurance Co. Ld.*,[12] and *In re Carlton*.[13]]

G. B. H. Dillon for the defendants. In the Act of 1938 the word "son" connotes a male child and "daughter" a female child, and the question is whether the word "child" in the Act of 1938 includes an illegitimate child. The correct test is that referred to by Vaughan Williams L.J. in *Woolwich Union* v.

[4] (1877) 47 L.J.Ch. 62.

[5] [1949] 2 K.B. 388, 394, 396.

[6] [1950] 2 K.B. 328, 331.

[7] [1951] Ch. 785, 788.

[8] [1950] 1 K.B. 377.

[9] (1875) L.R. 10 Ch. 343.

[10] (1911) 81 L.J.K.B. 251.

[11] [1906] 2 K.B. 240, 246.

[12] [1931] 2 K.B. 125, 130.

[13] [1945] Ch. 372, 377.

1954

MAKEIN, DECD., *In re.* MAKEIN *v.* MAKEIN.

Guardians of Fulham,[14] namely, that the word "child" means a legitimate child, and that meaning must prima facie be given to the word whenever it occurs in a statute, unless one finds a sufficient context to justify an extended meaning being given to it. If "child" were given this extended meaning as a general principle of construction in the Act of 1938, it would have the extraordinary consequence that the word "child" in the Administration of Estates Act, 1925, would include an illegitimate child, because sections 46 to 49 of that Act are incorporated as amended by the Intestates' Estates Act, 1952, and form Part I of that Act.

Reliance has been placed on the word "family" in the title to the Act of 1938 to support the proposition that the statute envisages provision being made for an illegitimate child, but decisions under the comparable statutes of New Zealand and New South Wales, entitled the Family Protection Act, 1908, and the Testator's Family Maintenance Act, 1916, respectively, assume that only legitimate children have a valid claim under those Acts. The "family" cases under the Rent Restrictions Acts, for example, *Brock* v. *Wollams*,[15] have no application and are distinguishable. The question in the present case is the ambit of the class of persons who comes within section 1 of the Act as possible claimants. On the test propounded by Vaughan Williams L.J. in *Woolwich Union* v. *Guardians of Fulham* [16] an illegitimate child is plainly not within this section. This view is reinforced by the interpretation section, section 5, which expressly includes within the expressions "son" and "daughter" an adopted male or female child and a son and daughter en ventre sa mere at the date of the death of the deceased; this points to the conclusion that other persons not expressly included within the definition of "son" and "daughter" must be deemed to be excluded. [Reference was made to section 55 (2) of the Administration of Estates Act, 1925, and to Jarman on Wills, 8th ed., vol. 1, at pp. 77, 78.]

In *In re Joslin* [17] Farwell J. decided that the deceased owed a moral obligation towards his illegitimate children. The decision is no authority for the proposition that an illegitimate child is a dependant within the meaning of the Act. *In re Peete* [18] and *In re Watkins, decd.*,[19] are relied on as indicating the court's strict approach to the Act.

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[14] [1906] 2 K.B. 240, 246.

[15] [1949] 2 K.B. 388.

[16] [1906] 2 K.B. 240, 246.

[17] [1941] Ch. 200.

[18] [1952] W.N. 406; [1952] 2 T.L.R. 383.

[19] [1953] 1 W.L.R. 1323.

The fact that the legislature in certain statutes has provided for illegitimate children to benefit under the provisions of those statutes is no guide as to its policy in relation to this Act. Section 2 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, expressly refers to illegitimate children. It is noteworthy that under section 9 of the Legitimacy Act, 1926, the illegitimate child's right of succession is very limited; he is only entitled to succeed to his mother's property and to that only in the event of her leaving no legitimate child.

The duties of a putative father towards his child are very limited under English law: see Halsbury's Laws of England, 3rd ed., vol. 3, at p. 108. A father's liability towards his bastard child does not survive death, and arrears under a bastardy order are not recoverable against the father's estate: *In re Harrington.*[20] There is no indication that it was the intention of the legislature in passing the Act of 1938 and the Intestates' Estates Act, 1952, to change the law and place a much more onerous burden on a putative father. An examination of the decisions under the comparable statutes of New Zealand and New South Wales makes it plain that illegitimate children are not within the ambit of those Acts: see *In re Pritchard*[21]; *E.* v. *E.*,[22] and *Pulleng* v. *Public Trustee.*[23]

Platts-Mills in reply. The decisions under the New Zealand and New South Wales statutes are concerned with the construction of the word "child," a word which has a very limited meaning. The English legislature, which obviously had the Commonwealth legislation in mind in passing the Act of 1938, has used the words "son" and "daughter" in preference to the words "child" and "issue," and it is submitted that that is a significant change of language. In *E.* v. *E.*[24] and in *In re Pritchard*[25] the question whether an illegitimate child came within the provisions of the New Zealand and New South Wales Acts was never argued.

Cur. adv. vult.

December 8, 1954. HARMAN J. read the following judgment: Alfred Makein (or Makin), in the matter of whose estate this summons was issued, died, as an act of probate issuing on January 29, 1954, out of the Principal Probate Registry shows, on June 12, 1953, intestate, leaving a lawful widow, the first defendant, to whom and to the second defendant (who is, I am told, his lawful son) a grant of administration was made on January 21 last, the estate being sworn at some £16,000 net. On June 4 last this originating summons was issued, entitled in the matter of the intestate's estate and the Inheritance (Family Provision) Act, 1938, the infant plaintiff applying by his next friend, styling herself his mother Betty Leventhal (feme sole). According to the plaintiff's birth certificate, he was born on February 13, 1946, a son of the intestate, and of the next friend: he is described in the originating summons as the natural son of the intestate.

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[20] [1908] 2 Ch. 687.

[21] (1940) 40 N.S.W.S.R. 443.

[22] (1915) 34 N.Z.L.R. 785, 794.

[23] (1922) 41 N.Z.L.R. 1022.

[24] 34 N.Z.L.R. 785, 794, 801, 804.

[25] 40 N.S.W.S.R. 443.

On the first appointment before the master it appears that the defendants put in issue the question of the plaintiff's paternity and further took the point that even if the plaintiff proves to be that which he claims in the summons, namely, the natural son of the intestate, he is nevertheless not a dependant within the Act. Accordingly he was allowed to amend the summons by asking for a declaration that he is such a dependant, and this issue has been adjourned to me as a point of law without any case stated or evidence filed, apparently under R.S.C., Ord. 34, r. 2, although no order seems to have been made under that rule. This seemed to me at one time an inconvenient way of dealing with the matter, but I was prevailed upon to do so and must make certain assumptions as though this were a proceeding in lieu of demurrer under R.S.C., Ord. 25, r. 2, which only applies to actions by writ. I assume, therefore, for the purposes of what follows that the plaintiff may be able to prove one or more of the following facts: (i) that he is a natural son of the intestate, (ii) that he has been acknowledged as such in the intestate's lifetime, and (iii) that he has been treated as one of the intestate's family, using that word in a layman's sense. I assume also that the intestate left, besides his widow, a legitimate spinster daughter, undoubtedly a dependant within the meaning of the Act.

The intestate died after the coming into force of the Intestates' Estates Act, 1952, which considerably amended the Act of 1938, and extended it to apply to cases of intestacy. It is, under the new section 1 (1), a condition precedent to the plaintiff's claim that the law relating to intestates' estates is not such as to make reasonable provision for his maintenance. In fact it is admitted that the law of intestacy makes no provision, for a natural child cannot by the law of England succeed on intestacy to any part of the estate of his father, though he may under the Legitimacy

Act, 1926 (section 9) succeed to his mother's property if she have no lawful issue.

Now the law of intestate succession was considerably altered by the same Intestates' Estates Act, 1952, which amended the Act of 1938, and the plaintiff's claim has this startling feature, that though he have no claim as being issue or a child of the intestate under Part I of the Act of 1952, he may yet have provision made for him by the court as an infant son of the intestate under Part II of the same statute. As the two parts spring from separate statutes, namely, the Administration of Estates Act, 1925, and the Inheritance (Family Provision) Act, 1938, it is not impossible to achieve this result, but it seems to me that to arrive at it some very cogent reasons must be adduced. The reason why the plaintiff cannot rank among the statutory next-of-kin of the intestate as one of his issue or children is because in the eye of the law these words, in the absence of some context, connote legitimate issue and legitimate children. "The rule," says Lord Eldon L.C. in *Wilkinson* v. *Adam*,[1] "cannot be stated too "broadly, that the description, 'child, son, issue,' every word of "that species, must be taken prima facie to mean legitimate "child, son, or issue." See also *Hill* v. *Crook*,[2] where the headnote reads as follows: "The word 'children' used in a will prima "facie means legitimate children, and no other meaning can be "given to it by any conjectural application of other words found "in the will and supposed to show the testator's intention; there "must be clear evidence of that intention in the will itself to "establish another application of the word. There may be a gift "to living illegitimate children as a class if the words used by "the testator clearly show that such children were intended to be "the objects of his bounty. But whether any such gift to future "illegitimate children can take effect? *quaere*? If there is a gift "to 'children' as a class, the law, if there is nothing in the will "clearly to show a contrary intention, will apply the gift to "legitimate children only." In that case, in fact, illegitimate children were held on construction to be entitled to share; and Lord Cairns, at the beginning of his speech, after saying that he had looked through a long line of cases upon the subject of a will dealing with children who were said to be illegitimate, said[3]: "I "have referred to those cases not with the view of finding a will "exactly parallel with the present, for that, indeed, would be a "hopeless task, but for the purpose of extracting any principle

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[1] (1813) 1 Ves. & Bea. 422, 462.

[2] (1873) L.R. 6 H.L. 265.

[3] Ibid. 282.

"which appeared to be the ratio decidendi of those various cases. "And what appears to me to be the principle which may fairly be "extracted from the cases upon this subject is this—the term "'children' in a will prima facie means legitimate children, and "if there is nothing more in the will, the circumstance that the "person whose children are referred to has illegitimate children "will not entitle those illegitimate children to take. But there "are two classes of cases in which that prima facie interpretation "is departed from. One class of cases is where it is impossible "from the circumstances of the parties that any legitimate "children could take under the bequest. A familiar example of "that might be given in this way:—Suppose there is a bequest "'*to the children of my daughter Jane*,' *Jane* being dead, and "having left illegitimate children, but having left no legitimate "children. There, inasmuch as the testator must be taken to "have known the state of his family, and must be taken to have "intended to benefit some children of his daughter *Jane*, and "inasmuch as she had no children who could be benefited except "illegitimate children, rather than that the bequest should fail "altogether the courts will hold that those illegitimate children "are intended, and they will take under the term 'children.' "Having referred to that class of cases, I may put them altogether aside; for your Lordships will observe that that class of "cases can have no bearing upon the present case, because here, "as was truly said, there was no reason why legitimate children "might not take under the bequest in this will. The other class "of cases is of this kind. Where there is upon the face of the "will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention "of the testator to use the term 'children' not merely according "to its prima facie meaning of legitimate children, but according "to a meaning which will apply to, and which will include, "illegitimate children. I might give again a familiar illustration "of that class of cases by the supposition of a bequest upon "which, I presume, there would be no argument. Suppose that "a testator were to say in his will, 'being aware that my "'daughter, who is now married to her husband, had before her "'marriage children by the same person, who in law are illegitimate children, and it being my intention to provide for all the "'children of my daughter, I give funds to trustees upon trust "'for her for life, and after her death to divide the funds among "'the children of my said daughter.' I apprehend that no person 'reading a bequest of that kind could hesitate to say that the "testator had shown upon the face of his will, by the words which "he had used, his intention, in a way that could not be mistaken, "to use the generic term 'children' so as to include illegitimate "children along with legitimate children."

The same principle applies to statutes, as appears in Vaughan Williams L.J.'s judgment in *Guardians of Woolwich Union* v. *Guardians of Fulham*,[4] of which the headnote reads: "An "illegitimate child can, under section 34 of the Divided Parishes "and Poor Law Amendment Act, 1876, before attaining the age "of sixteen acquire a settlement by residence in a parish with "its mother for the period and under the circumstances mentioned in that section. The proviso to section 1 of the Poor "Removal Act, 1846, as amended by the Poor Removal Act, 1848, "does not apply to illegitimate children." Vaughan Williams L.J., discussing the argument of counsel under the Poor Removal Act, said this[5]: "That being so, he argued that the proviso to "the section did not apply in the case of an illegitimate child. "He relied for the purpose of that argument upon the technical "rule of law that the word 'child' or 'children' means a "legitimate child or legitimate children, and that meaning must "prima facie be given to the word whenever it occurs in a statute. "It is, of course, true that that is only prima facie the meaning "to be given to the word, and that a wider meaning may, in the "case of some statutes, be given to it, so as to include an "illegitimate child or illegitimate children, where that meaning is "more consonant with the object of the statute."

Of course, this strict meaning of the words may be enlarged and it is, I think, possible to trace, over the last century and a half, some relaxation in the strictness of proof required. Lord Eldon L.C. said that illegitimate children could only share where it appeared by "necessary implication" that the testator intended that they should do so, but at any rate since *Hill* v. *Crook*[6] the question is one of construction. Again, gifts to illegitimate future born children were at one time considered void as being contrary to good morals and public policy, but that view does not in all its strictness obtain today. In cases on the construction of wills, the word "children" has often been held to have the extended meaning of descendants, but the courts have declined to admit that this latitude should be introduced into the construction of statutes. In *Maund* v. *Mason*[7] the court declined to extend the meaning of " children " in the statute of 43 Eliz. 1, c. 2, to grandchildren: see Blackburn J.'s observations in the report of that case. A like result was reached in *Coleman* v. *Birmingham Overseers*,[8] a case concerned with the Married Women's Property Act, 1870. Notwithstanding this, it was urged upon me that the law takes a broader view in these days and that in a modern statute, at any rate, some very slight indication will be enough to induce the court to include illegitimate together with legitimate, apparently in order that the former may compete with the latter for a share in the father's bounty. The case was put quite broadly, namely, that any infant son or spinster daughter who could prove himself or herself to be the natural offspring of the deceased man might claim to share in his estate as a dependant, whether acknowledged as his by him or no and whether or no brought up as a member of his family. On this view, it seems to me that a person who was by repute, though not in law, the widow of the deceased might, by parity of reasoning, have a claim under the Act, and that even though there were a lawful widow.

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[4] [1906] 2 K.B. 240; 22 T.L.R. 579.

[5] [1906] 2 K.B. 246.

[6] L.R. 6 H.L. 265.

[7] (1874) 43 L.J.M.C. 62, 64.

I say at once that it seems to me that these claims are altogether too widely stated, but this does not dispose of a claim in favour of a narrower class, namely, a son or daughter of the deceased acknowledged as such or brought up together with or in the place of legitimate offspring. Can persons have a claim under an Act whose short title is the Inheritance (Family Provision) Act who can show that they have been brought up as members of the family or are by repute sons or daughters of the deceased?

Now, the word " family " has had many meanings attributed to it in law. This is illustrated by the case of *Humble* v. *Bowman*,[9] where a power to appoint among the family was held to extend to illegitimate offspring. The headnote was this: " Devise and bequest to testator's widow for the term of her " natural life, ' and to be distributed to the testator's family at " ' her decease as she might think proper ':—*Held*, that the " power of distribution was not testamentary only, but was " exercisable by deed, and that, under the word ' family,' an " illegitimate child whom the testator had treated and recognized " as a child was included as an object of the power." The judge, Hall V.-C., said this[10]: " No doubt illegitimate children are not " included under a gift to children, but I look upon the dictum of

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[8] (1881) 6 Q.B.D. 615.

[9] (1877) 47 L.J.Ch. 62.

[10] Ibid. 65.

"James L.J. in *Lambe* v. *Eames*[11] (though not necessary for "the decision in that case) as an authority that, under the "description 'family' in a power of appointment, a natural child "may be included. Although the word 'family' may ordinarily "mean children and nothing else, it is, I think, not unreasonable "that a natural child who has been treated and recognized as a "child by the parent should be so included." Similarly, one may look at cases under the Rent Restriction Acts: see, for instance, *Brock* v. *Wollams*,[12] where the headnote runs thus: This is attributed to Denning L.J.: "Members of the tenant's "family within the meaning of the subsection"—that is, a subsection in the Act of 1933—"would include step-children and "illegitimate children as well as adopted children, whether "adopted in due form of law or not." Sir George Jessel M.R. in *Pigg* v. *Clarke*,[13] said this: "The word 'family' has various "meanings. In one sense it means the whole household, including servants and, perhaps, lodgers. In another sense it means "everybody descended from a common stock, that is to say, all "blood relations; and it may, perhaps, include the husbands and "wives of such persons. In the sense I have just mentioned, the "family of A. includes A. himself; A. must be a member of his "own family. In a third sense, the word includes children only; "thus when a man speaks of his wife and family, he means his "wife and children. Now, every word which has more than one "meaning has a primary meaning; and if it has a primary meaning, you want a context to find another. What, then, is the "primary meaning of 'family'? It is 'children'; that is clear "upon the authorities which have been cited; and, independently "of them, I should have come to the same conclusion." If, then, "family" prima facie means "children," and "children" prima facie means legitimate children, "family" means legitimate family unless the context indicates the contrary.

In *In re Joslin*[14] an application was made under the Act of 1938 by a widow in a case where her husband had provided by his will not for her but for his mistress and his two children by her; and Farwell J. said this: "In these circumstances the "testator was in a dilemma. He owed a duty to his wife, who "had lived with him for many years, who had had a child by "him, and who had apparently assisted him with money from "time to time; and no doubt he treated her badly when he left

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[11] (1871) L.R. 6 Ch. 597, 600.

[12] [1949] 2 K.B. 388; [1949] 1 All E.R. 715.

[13] (1876) 3 Ch.D. 672, 674.

[14] [1941] Ch. 200, 202; 57 T.L.R. 293; [1941] 1 All E.R. 302.

"her and went to live with another woman. On the other hand, "he was under a moral, if not a legal, obligation to make "provision for his two children, who were none the less his "children because they were born out of wedlock, and for the "woman who had borne those children. In cases under this "Act the court has, in my view, to consider moral as well as "legal obligations and, in my judgment, in a case of this sort, "a testator is not only entitled, but is bound, to consider how "far there lies a duty on him—(it may be a moral duty)—to "make provision for the children whom he has brought into this "world and for the woman who has borne those children. On "the other hand, he has to take into consideration the duty which "he owes to the woman who was his wife and who, as in the "present case, had been through many vicissitudes with him and "assisted him from time to time. I do not think that that is an "easy dilemma for a man to face." The judge assumed there that "children" in the Act meant legitimate children: he added that under the Act regard might be had to the moral claims of the illegitimate. The point was not raised, but no one doubted that illegitimate children had no direct claim under the Act.

Several statutes were cited to me as showing that the word "children" can include illegitimate children, and this is, of course, true, as Vaughan Williams L.J. says in the passage already cited,[15] where that is more consonant with the object of the statute. In Lord Campbell's Act, 1846, which is entitled "An Act for compensating the families of persons killed by "accident," it was held that the word "child" in section 2 did not include an illegitimate child. That word was defined by section 5 as including son and daughter and grandson and granddaughter and any step-son and step-daughter. It required an amending statute, The Law Reform (Miscellaneous Provisions) Act, 1934, to enlarge the word "child" to include illegitimate child.

The question as to the meaning of the word "children" in the Poor Removal Acts, 1846 and 1848, seems to have caused a good deal of difficulty among judges: see *Braintree Union* v. *Rochford Union.*[16] The Act of 1846, in section 3, uses the words "children whether legitimate or illegitimate," and Darling J. considered that a reason for holding that the word "children" included illegitimate children. This reasoning does not commend itself to me. The House of Lords seems to have concluded in the *West Ham* case [17] that in these Acts the word had its wider meaning and this was no doubt because that was more consonant with the object of the statutes.

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[15] [1906] 2 K.B. 246.

[16] (1911) 81 L.J.K.B. 251; 28 T.L.R. 60.

In the Workmen's Compensation Act, 1925, section 4 deals with dependants, and these are by definition to include illegitimate children: see also section 8 and *Pritchard* v. *Bettisfield Colliery Ld.*[18] This is a good example to show that special words are needed to give the extended meaning.

With the Legitimacy Act, 1926, I have already dealt. It throws no light on this point.

The Industrial Insurance Act, 1923, provides by section 3 for the issue of industrial insurance policies for the funeral expenses of, among others, a child. This word was held by MacKinnon J. in *Morris* v. *Britannic Assurance Co. Ld.*[19] to include illegitimate children. He said: " The determination of this question depends " upon the answer to another question, which is this: Does the " word ' child ' in section 8 (1) (*b*), of the Friendly Societies Act, " 1896, and the word ' child ' in the Act of 1923, s. 3, mean a " child born in wedlock, or does it also include a child that is " illegitimate? If it does include a child that is illegitimate then " these policies are all of them legal. If it does not, then, subject " to any question that arises on the other branch of the case at " common law as to the insurable interest of parents in the funeral " expenses of an illegitimate child, they would be illegal. Prima " facie I agree that when in legal documents the word ' child ' " is used it means a legitimate child, but no doubt a consideration of the context may require one to give it a wider meaning " so as to include both legitimate and illegitimate children. The " proposition to which I referred just now as to the legal con-" struction of the word ' child ' is laid down sufficiently and " succinctly by Vaughan Williams L.J. in a case of a different " nature "; and he cited the passage which I have already read. He went on: " In this case, as appears from section 36 (1) of " the Act of 1909, the object of these statutes is to provide for " the funeral expenses to which parents and others are put on " the death of children and other relatives. It seems to me that " the incidence of those expenses cannot depend upon whether " before the birth of the particular child the mother did or did " not go through a ceremony in a church or registry office. The " nature of the duty or obligation as to which she is desirous of

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[17] [1894] A.C. 230; 10 T.L.R. 375.

[18] [1925] 2 K.B. 284; 41 T.L.R. 551.

[19] [1931] 2 K.B. 125, 130; 47 T.L.R. 318.

1954

MAKEIN, DECD., *In re.* MAKEIN *v.* MAKEIN.

Harman J.

"insuring is precisely the same whether the child happens to "be legitimate or illegitimate. Having therefore regard to the "purpose of the legislation I think the context in these sections "does require the word 'child' to have the wider meaning, as "being more consonant with the object of the statute, and "includes an illegitimate child as well as a legitimate child, and "that therefore these policies were legal." Thus the object of the statute required the broader meaning which was accordingly given to the word. This seems to be the high-water mark for an interpretation of this kind.

If, then, I am to give the broader meaning to the words "son" and "daughter" in this Act, it must be because that extended meaning is more consonant with the object of the statute. This was the first modern statutory interference in England with the freedom of testamentary disposition. Before 1938 a man might by his will disinherit his whole family, whatever sense be given to that word. At first sight it seems to me that an Act intended to cut down this freedom should not have a meaning given to the class of persons who may take advantage of it more extensive than its plain meaning warrants, because every person included among the dependants is a person having a right to question the testator's freedom to dispose of his own. Is there, then, any compelling reason for extending the class of dependants? It is said that there is, because a man has a moral obligation towards those he has brought into the world who, as Farwell J. said in the case already cited,[20] are none the less his children for having been born on the wrong side of the blanket. On the other hand, while a man is free to honour his moral obligations, it may be said the law is going quite far enough in compelling him to honour his legal obligations, that is to say, obligations towards those to whom he is legally bound, and that to extend the obligation is no part of the duty of society or the policy of the law. *In re Harrington* [21] shows that a putative father's liability ends with his death. It was pointed out to me that legislation on these lines in English-speaking countries originated in New Zealand: see *Bosch* v. *Perpetual Trustee Company* [22] for a general description. My attention was drawn to the New Zealand statute of 1908, entitled "The Family Protection Act," by section 2 of which "family" is defined as including wife and children, and under section 33 children are the objects of the protection. It appears that it has never been suggested that "children" in this Act meant anything but legitimate children; and I was referred to "*E.*" v. "*E.*",[23] where it was assumed that an illegitimate child had no claim but a moral one: see the judgment of Stout C.J. This case was followed in *Pulleng* v. *Public Trustee.*[24]

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[20] [1941] Ch. 200.

[21] [1908] 2 Ch. 687; 25 T.L.R. 3.

[22] [1938] A.C. 463; 54 T.L.R. 467; [1938] 2 All E.R. 14.

Similar legislation has been passed in New South Wales—see *In re Pritchard* [25]—where it was assumed that legitimacy was necessary in order to have a claim as a child under the New South Wales Act of 1916 called the Testator's Family Maintenance Act. It is true, apparently, that the point has not been argued in either jurisdiction. Counsel for the plaintiff asked me to hold that the word "son" was a broader word than the word "child," but this I reject altogether. In my judgment, a son means merely a male child.

Is it, then, more consonant with the object of the statute to give the words "son" or "child" an extended meaning? In my judgment it is not. I cannot think that the legislature contemplated applications by illegitimate offspring competing with the claims, whether under a will or intestacy, of the legitimate dependants. The task of the courts in those circumstances would be not only odious but impossible to carry out, for who could know what other dependants might enter the lists to make further claims to a share? It would indeed be visiting the sins of the fathers upon the children.

On the whole, then, I come to the conclusion that there is no reason for extending the words "son" or "daughter" in this Act beyond their ordinary legal meaning. On the contrary, in my judgment, there is good reason against it, and I decline to hold that an illegitimate son, whether brought up as a member of the family or no, has a claim under the statute of 1938, as amended by the Act of 1952.

Summons dismissed.

Solicitors: *Harold Miller & Co.; Carpenter, Wilson & Smith.*

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[23] (1915) 34 N.Z.L.R. 785, 794, 801, 804.

[24] (1922) 41 N.Z.L.R. 1022, 1028.

[25] (1940) 40 N.S.W.S.R. 443.

1954
Oct. 6, 7, 15.

Vaisey J.

C. A.

1954
Nov. 23, 24, 25, 30.

Evershed M.R., Jenkins and Birkett L.JJ.

PRESCOTT *v.* BIRMINGHAM CORPORATION.

[1953 P. 7398.]

Local Government — Powers — Corporation — Transport — Free travel facilities for old persons in need—Payment out of general rate fund—Validity—Birmingham Corporation Act, 1903 (3 *Edw.* 7, *c. cxcii*), *s.* 31—*Birmingham Corporation Act,* 1914 (4 & 5 *Geo.* 5, *c. cvi*), *s.* 12 (1)—*Birmingham Corporation Act,* 1954 (2 & 3 *Eliz.* 2, *c. xliv*), *ss.* 51, 55—*Road Traffic Act,* 1930 (20 & 21 *Geo.* 5, *c.* 43), *ss.* 72, 104.

Transport.

The Birmingham Corporation operated a transport undertaking under the Birmingham Corporation Acts, 1876 to 1954, subject to the provisions of the Road Traffic Act, 1930. Their local Acts authorized the corporation to charge fares for the conveyance of passengers.

On January 6, 1953, the council of the corporation resolved that, subject to the consent of the appropriate licensing authority under the Road Traffic Act, 1930, a scheme should be put into operation to provide free travel on the corporation's omnibuses for certain classes of old persons, who numbered in the aggregate about 70,000. The licensing authority gave the necessary permission to the corporation to carry the scheme into effect, subject to the payment of £90,000, the estimated cost for a year of the scheme, by the corporation to its transport undertaking. Such sum was paid out of the general rate fund. In an action by a ratepayer to test the validity of the scheme Vaisey J. held that it was illegal and ultra vires the corporation. On appeal:—

Held, (1) that local authorities owed a fiduciary duty, analogous to that of a trustee, to their ratepayers; and, therefore, that although in the absence of any equality clause in the statutes under which it operated, a body having statutory power to charge tolls, rates or fares was entitled to discriminate in the charges made to different people, a local authority running an omnibus undertaking at the risk of their ratepayers was not entitled to make a gift of free travel on their vehicles to particular classes of persons whom the local authority were of opinion ought, on benevolent or philanthropic grounds, to be accorded that benefit; and that to grant such free travel, in the absence of statutory authority, was illegal, since it amounted to making a gift in money's worth to a particular section of the community at the expense of the general body of the ratepayers. (See pp. 234–5, post.)

See
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Case
1981

(2) That it was implicit in the Birmingham Corporation Acts that, while it was left to the corporation to decide what fares should be charged within any prescribed statutory maxima, its transport undertaking was to be run as a business venture, the fares being fixed by the corporation at their discretion in accordance with ordinary business principles, although in operating such undertaking the corporation need not be guided by considerations of profit

to the exclusion of all other considerations, but that the scheme of free travel was wholly beyond the powers of the corporation. (See p. 236.)

(3) That the corporation in adopting the scheme had misapprehended the nature and scope of the discretion vested in them when they supposed that it enabled them to confer benefits in the shape of free travel on any class or classes of the local inhabitants appearing to be deserving of such benefits; and that the decision to adopt the scheme was not a proper exercise of the discretion vested in the corporation with respect to the differential treatment of passengers in the matter of fares. (See p. 237.)

Hungerford Market Co. v. *City Steamboat Co.* (1860) 3 E. & E. 365; *Duke of Newcastle* v. *Worksop Urban Council* [1902] 2 Ch. 145; 18 T.L.R. 472 and *Roberts* v. *Hopwood* [1925] A.C. 578; 41 T.L.R. 436 considered.

Northampton Corporation v. *Ellen* [1904] 1 K.B. 299; 20 T.L.R. 168 distinguished.

Decision of Vaisey J. affirmed.

ACTION.

This was an action by Gregory Vincent Prescott, a ratepayer of the City of Birmingham, for a declaration: (1) that a scheme adopted by the defendants, Birmingham Corporation, for providing free travel facilities for certain classes of old people was illegal and ultra vires and beyond the powers of the defendants; (2) that the defendants were not entitled to apply, expend or use any part of the general rate fund in operating the scheme, and that the use of the general rate fund for such purpose was illegal and ultra vires and beyond the powers of the defendants; (3) that an order dated March 20, 1953, was not solely in respect of liabilities within the meaning of section 185 of the Local Government Act, 1933.

[The following statement of facts and of the relevant provisions of the Birmingham Corporation Acts, 1876 to 1954, is taken from the judgment of the Court of Appeal.]

By virtue of provisions contained in the Birmingham Corporation Acts the defendants owned and operated a passenger road transport undertaking in the City of Birmingham, and were empowered to charge, as they normally did charge, fares to passengers travelling upon their vehicles.

At a meeting of the defendants' council held on October 14, 1952, it was resolved as follows: "41,967 . . . that this council
" being of opinion it is desirable that women of the age of 65 years
" and over and men of the age of 70 years and over should have
" free use of the corporation's public transport services between
" the hours of 10 a.m. and 4 p.m. on every day except Saturdays,

"the general purposes committee be, and they are hereby, "requested . . . to submit to this council as soon as possible a "scheme for the provision of such free travel facilities together "with an estimate of the cost which it is intended shall be "borne by the general rate fund."

At a further meeting of the defendants' council held on January 6, 1953, the general purposes committee submitted their report, in which, after mentioning that inquiries had been made of 25 transport authorities believed to be affording free or concessionary travel to old people, and referring to doubts which had been raised as to the legality of what was proposed, they dismissed, on grounds of delay, the possibility of obtaining by private Act of Parliament whatever additional powers might be necessary, and continued: "Seeing, however, that about 20 "transport authorities are already operating various types of "schemes for the provision of free or concessionary travel for old "people, and seeing that some of those schemes have been in "operation for a number of years—so far as is known without "challenge to their legality—your committee are of opinion that "effect should be given to the desire of the council as expressed "in resolution No. 41,967, notwithstanding that there may not "be specific statutory enabling power."

Then, after calling attention to the necessity for approval of the scheme by the licensing authority under the Road Traffic Act, 1930, the report set out the committee's recommendations, the more material passages in which were the following: "1. *Class* "*of persons entitled to participate in the scheme.* Although it is "not laid down in council minute No. 41,967 your committee "think that it would be in accordance with the intention of the "council that the scheme should be limited to old age pensioners "being women of the age of 65 years and over and men of the age "of 70 years and over and who are residing in the city.

"It appears that the term 'old age pensioner' might well be "taken to cover the undermentioned classes:—(a) Persons in "receipt of a 'retirement pension' payable under the National "Insurance Act, 1946, and (b) persons in receipt of an old age "pension granted by the National Assistance Board under the "Old Age Pensions Act, 1936, to persons who were not contributors to national insurance.

"In addition to the above two classes of pensioners, your "committee consider that a further class of person is in a position "of need which is at least equal to that of the pensioners. It is "understood that certain persons, who are in receipt of neither

" of the above pensions, are granted assistance by the National " Assistance Board by way of a weekly payment under an order " book. Your committee feel that persons in this category who " are above the specified ages should be equally entitled to " participate in the scheme.

" It is therefore recommended that the scheme be applied to " all women of the age of 65 years and over and men of the age " of 70 years and over who are either on the register of Parliamentary electors for the city or who otherwise satisfy the general " manager of the transport department of bona fide residence in " the city and who come into the following categories:—(a) persons in receipt of a 'retirement pension' payable under the " National Insurance Act, 1946; (b) persons in receipt of an old " age pension granted by the National Assistance Board under " the Old Age Pensions Act, 1936, to persons who were not " contributors to national insurance; (c) persons in receipt of " national assistance payable by order book.

" 2. *Initial issue of passes.* In the opinion of your committee " the most satisfactory method of operating the scheme is by the " issue of passes to the persons eligible . . .

" 3. *Estimated cost of initial issue of passes.* . . . Total: " Approximately £3,100.

" 4. *Issue of passes after scheme is introduced.* It is recommended that all applications for passes after the scheme is " introduced be made in person and dealt with at the head office " of the transport department.

" It is estimated that at least 12,000 new and replacement " passes will have to be issued annually (approximately 40 per " day). This will require a staff of two but it is anticipated that " they will also be able to deal with scholars' permits, blind and " disabled persons' passes, etc.

" 7. *Availability of passes.* . . . On the Dudley Road services " jointly operated with the Birmingham and Midland Motor Omnibus Co. Ld. and in the case of that company's services partly " or wholly operated within the city on behalf of the corporation " transport department which are subject to a financial agreement " with the company, it will be necessary to arrange with them for " the passes to be honoured within the city on these services and, " possibly, to negotiate a financial adjustment to compensate for " loss of revenue.

" With regard to the Dudley and Wednesbury services jointly " operated with the West Bromwich Corporation, it will be "necessary to arrange with them for the passes to be honoured "on these services within the city.

"8. *Cost of operating scheme.* The estimated number of "women of the age of 65 years and over and men of the age of "70 years and over in receipt of government old age pensions "and residing in the city is 65,925, to which number must be "added approximately 5,500 persons in receipt of national assistance payable by order book. The proportion of the people in the "three categories eligible to apply who will in fact apply can only "be determined in the light of experience.

"It is also impossible to forecast what proportion of the free "journeys taken by persons entitled to this concession will "actually represent loss of revenue and what proportion will "represent entirely new traffic, or to what extent it may become "necessary to augment services, but it appears reasonable to "assume that some augmentation will be inevitable, particularly "during lunch hour periods and from approximately 3.30 p.m. to "4 p.m. weekdays and also on Sundays.

"In view of the impossibility of making precise estimates as "to the cost, your committee recommend that a sum of £90,000 "be paid to the transport committee in consideration of their "operating the scheme for a period of 12 months commencing "April 1, 1953, but that in the event of the scheme not being "brought into operation until after that date, the said sum of "£90,000 shall be reduced proportionately, and that the financial "position be further reviewed at the expiration of that period "when more reliable statistics are available."

The report concluded with a summary of the committee's recommendations substantially in the terms appearing from the following resolution which was passed at the same meeting of the defendants' council: "*Resolved*—42,085. That, subject to the "approval of the licensing authority for public service vehicles, "the scheme, as more particularly referred to in the foregoing "report, for the provision of free travel facilities for the categories of old people mentioned therein, be, and is hereby "approved and adopted with effect on and from April 1, 1953, "or as soon as possible thereafter; that a sum of £90,000 be "transferred from the general rate fund to the transport committee in consideration of their operating the scheme for a "period of 12 months from April 1, 1953 (provided that in the "event of the scheme not being brought into operation until "after that date, the said sum of £90,000 shall be reduced proportionately); that the financial position be further reviewed at "the expiration of that period in the light of information then "available; and that the finance committee be, and they are "hereby, authorized and requested to make provision for this "expenditure in their estimates for the ensuing financial year."

By the Birmingham Corporation Act, 1903, the defendants were empowered to operate tramways and to construct an additional tramway as therein mentioned. Section 31 of this Act provided: "The corporation may demand and take for every "passenger travelling upon the corporation tramways or any "part or parts thereof including every expense incidental to such "conveyance a fare not exceeding one penny per mile and in "computing the said fare the fraction of a mile shall be deemed a "mile."

Section 34 prohibited the defendants from making any charge for a passenger's personal luggage not exceeding 28 lbs. in weight. Section 35 empowered the defendants to charge in respect of animals, goods and parcels any rates or charges not exceeding those specified in the third schedule. Section 38 required the defendants to operate services for artisans, mechanics and daily labourers every morning and evening at fares not exceeding one halfpenny for every mile or fraction of that distance. Section 39 provided for the periodical revision of rates and charges by the Board of Trade (but subject to the maximum fares and charges authorized by the Act) on representations in writing made by twenty inhabitant ratepayers of the city or by the defendants. Section 52 (1) provided for the application of revenue derived from the defendants' tramway undertaking, and subsection (2) provided that any deficiency in the revenue of the defendants' tramway undertaking should be made good out of the borough rate of the city made next after such deficiency was ascertained.

The Birmingham Corporation Act, 1914, empowered the defendants to provide and run motor omnibuses, section 12 (1) of that Act being in these terms: "The corporation may provide "(but shall not manufacture) and maintain motor omnibuses and "may run the same within the city demanding and taking the "like tolls fares and charges for the conveyance of passengers "therein as they are for the time being authorized to demand "and take for passengers travelling on the tramways of the "corporation." Subsection (9) of the same section applied to the defendants' omnibus undertaking the provisions of (inter alia) the Act of 1903, including section 52 of that Act.

Under the Road Traffic Act, 1930, it became necessary for the defendants to obtain road service licences in respect of the routes worked by their omnibus undertaking. See section 72, which (by subsection (1)) empowers the traffic commissioners for any traffic area to grant to any person applying therefor "a road service "licence" to provide such a road service as may be specified therein, and prohibits the use of any vehicle as a stage carriage or express carriage except under such a licence; and (by subsection (2) (as amended by the Road Traffic Act, 1934)) provides, in effect, that a road service licence does not cover the use of a vehicle as a stage carriage or an express carriage, unless it is so used by the holder of the licence and (except in so far as compliance with the provisions of the licence may have been dispensed with by the appropriate traffic commissioners) in accordance with the provisions thereof; and by subsection (8) applies the requirements as to road service licences to local authorities authorized by the Act of 1930, or (as in the defendants' case) by special Act, to provide a service of stage carriages or express carriages. Section 72 (6) of the Act of 1930 also empowers the traffic commissioners, where an application for a road service licence has been made, and it is represented by any person interested that it is necessary or desirable in the public interest for them to do so, to fix minimum or maximum fares and make it a condition of the licence that fares shall not be charged under or in excess of the minimum or maximum; this is, however, subject to subsection (7) which states that this section is not to be taken to authorize the commissioners to fix maximum fares in respect of any service or stage where provision is made by any Act for the fixing of fares or maximum fares in respect thereof, or to fix a minimum fare for any stage in excess of any fare or maximum fare for the time being fixed for that stage under any such Act.

By section 101 (1) of the Act of 1930 a local authority who, under any local Act or order, are operating (inter alia) a tramway or omnibus undertaking may, as part of that undertaking, run public service vehicles on any road within their district.

By section 104 of the Act of 1930: "(1) A local authority "authorized to run public service vehicles under this Part of "this Act may demand and take for passengers and parcels "carried on such vehicles such fares and charges as they may "think fit: Provided that every passenger may take with him "personal luggage not exceeding twenty-eight pounds in weight "without extra charge. (2) A local authority authorized to "run public service vehicles under this Part of this Act may "if they think fit carry on such vehicles small parcels not "exceeding fifty-six pounds in weight and dogs in the care of "passengers, the charge for any such dog to be a sum not "exceeding the fare payable by the passenger, but they shall not "carry on such vehicles any other goods or animals."

Under the provisions of paragraph 1 (B) of regulation 56 of the Defence (General) Regulations, 1939, certain changes were made, and a longer period was allowed for the debiting of any loss on the defendants' transport undertaking to the general rate fund. Nothing turned upon them for the purposes of the present case.

The defendants duly complied with the requirements of the Act of 1930 with respect to road service licences. From a copy of one of such licences produced to the court by way of specimen, it appeared that one of the conditions on which such licences were granted was that the fares to be charged by the defendants should be those shown in a schedule to the licence. Thus the specimen produced showed in the third schedule thereto three different scales of fares in columns headed respectively "Ordinary Fares," "Children's Fares" and "Workmen's Fares," with the following notes: "Workmen's tickets are not to be issued or accepted on "Sundays and such other days as may be announced. Children's "Fares: Children under 5 years of age—free provided they do "not occupy a seat required by an adult. Children who have "attained the age of 5 years but have not yet attained the age of "14 years, half the adult fare."

The conditions attached to the defendants' road service licences including, as they did, the fares to be charged, it was necessary for the defendants, before carrying their scheme for free travel facilities into effect, to obtain from the licensing authority a dispensation from compliance with the conditions attached to their licences, to the extent required for the purpose of affording the free travel facilities contemplated by the scheme. The appropriate dispensation was applied for by the defendants and was granted for the period of one year from May 3, 1953, by a letter from the licensing authority dated February 14, 1953. The two concluding paragraphs of that letter were in these terms: "This authority is subject to the payment by the city council "to the transport undertaking of the sum of £90,000 for the first "year's operation of the concession, and is issued in accordance "with the proviso to section 72 (10) of the Road Traffic Act, 1930, "and with reference to section 72 (2) of the Road Traffic Act, "1930, as amended by section 40 of the Road Traffic Act, 1934, "and the Third Schedule to this Act.

"If it is desired to continue this free travel facility beyond "the period for which authority has now been given, you will no "doubt make further application to the licensing authority for "continuing authority in sufficient time to enable due consideration to be given to the application, and at the same time the "licensing authority would desire to be furnished with an up-to-"date report on the first year's operation of the scheme in all its "aspects."

The writ in the present action having been issued on December 18, 1953, it appeared that the defendants applied to the licensing authority for an extension of the dispensation pending the decision of the court on the legality of the scheme, and were granted an extension of three months from May 3, 1954, which was later supplemented by a further three months' extension expiring on November 2, 1954.

Since the issue of the writ in the present action, the Birmingham Corporation Act, 1954 (which came into force on July 30, 1954) had (by section 51) repealed section 52 (2) of the Act of 1903, as extended by section 12 of the Act of 1914, and had (by section 55) amended section 12 (1) of the Act of 1914 to read as follows: "12 (1) The corporation may provide (but shall not "manufacture) and maintain motor omnibuses and may run the "same within the city demanding and taking for passengers and "parcels carried thereon such fares and charges as they may "think fit subject to the provisions of the Road Traffic Act, "1930."

By an order dated March 20, 1953, the defendants authorized a payment out of the general rate fund of £153,488 10s. 4d. Of this sum an amount of £23 8s. 8d. was directly and solely attributable to the furtherance and implementation of the scheme.

Frank Blennerhassett for the plaintiff. The validity of this scheme is questioned on four grounds: (1) The spending powers of the corporation are limited by the Municipal Corporations Act, 1882, and the Local Government Act, 1933, and moneys can only be expended by the corporation as provided by those Acts or by any other relevant statutory provisions. (2) There is no specific statutory power which enables the corporation to engender a scheme of this nature; on the contrary, it is prohibited, by implication, by the Birmingham Private Acts empowering the corporation to run a public transport undertaking. (3) By the Road Traffic Act, 1930, a local authority is empowered to charge such fares as it thinks fit in respect of its public transport undertaking, but it is an improper exercise of that power for an authority to make no charge for the right of travelling in its vehicles. (4) This is a welfare scheme, and there is now in existence a body of welfare legislation which not only defines the duties of a local authority but also restricts them to the duties which are set out.

Birmingham Corporation was incorporated by royal charter in 1838, but although a chartered corporation has greater powers than those of a statutory corporation that fact has no relevance in relation to the present proceedings. As to the distinction between charter powers and statutory powers, see *Attorney-General* v. *Manchester Corporation.*[1] Since the passing of the Municipal Corporations Act, 1835, a municipal corporation, whether a chartered corporation or not, has not unlimited spending powers. *Attorney-General* v. *Leicester Corporation*[2] ought not to be followed. In that case Farwell J. held that a corporation were entitled to purchase the business of an omnibus proprietor out of their rate fund because the Local Government Act, 1933, had repealed subsections (2), (3) and (4) of section 140 of the Municipal Corporations Act, 1882, which had placed restrictions on the objects on which a municipal corporation could spend its general rate fund. The court, however, was not referred to the Act of 1835: see the criticism of this decision in Lumley's Public Health, 12th ed., vol. 2, p. 1642.

The charter of Birmingham Corporation was subject to the provisions of the Municipal Corporations Act, 1835, and, accordingly, at its inception the corporation had limited powers which. unless they have been specifically enlarged at some subsequent date, it still possesses. It is true that the Municipal Corporations Act, 1882, repealed the Act of 1835, but the Act of 1882 was a consolidating Act and it could not enlarge the corporation's powers other than by specific provisions. The repeal of section 140 (3) of the Act of 1882 by section 185 of the Local Government Act, 1933, does not affect the question.

By the Birmingham Corporation Act, 1903, the defendants were empowered to operate tramways, and the Birmingham Corporation Act, 1914, empowered them to provide and run motor omnibuses. Section 12 (9) of the Act of 1914 applied to the defendants' omnibus undertaking the provisions of the Act of 1903, including section 52 of that Act. Section 52 (2) of the Act of 1903 only permitted the general rate fund to bear a deficiency after such deficiency had been ascertained. It is plain, therefore, that the payment of £90,000 from the general rate fund to the transport committee of the defendants to finance this scheme cannot be authorized under section 52 (2), for it is not a deficiency within the meaning of the subsection, but *an estimate* of the cost of making this concession. Section 104 of the Road Traffic Act, 1930, empowers a local authority operating an omnibus undertaking under any local Act or order and running public service vehicles as part of such undertaking to charge " such fares . . . " as they may think fit." To make no charge for such services is an improper exercise of that power.

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[1] [1906] 1 Ch. 643, 651.

[2] [1943] Ch. 86, 95.

The scheme in question is a welfare scheme, and there is now in existence a body of welfare legislation which not only defines the duties of a local authority but also restricts them to the duties which are set out. For examples of the nature of the obligations placed upon a local authority see sections 21 and 29 of the National Assistance Act, 1948. A scheme of this nature is not within the scope of the welfare work provided by statute to be performed by a local authority. [Reference was also made to *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee*,[3] *Tynemouth Corporation* v. *Attorney-General*[4] and Halsbury's Statutes, vol. 16, p. 653n.]

Michael Rowe Q.C. and *Harold Lightman* for the defendant corporation. This action raises two points of law. First, whether it is or was lawful for the defendants to have a scheme of this nature at all; and secondly, whether the method adopted to finance the scheme is itself lawful. The answer to the first question depends on whether the defendants have statutory power to charge whatever fares they may think fit for the use of transport services run by them. A perusal of sections 31 and 38 of the Birmingham Corporation Act, 1903, section 12 of the Birmingham Corporation Act, 1914, sections 72 (6) and 104 of the Road Traffic Act, 1930, and section 55 of the Birmingham Corporation Act, 1954, shows that the defendants are empowered (not enjoined) to charge fares, and are, moreover, empowered to charge such fares as they think fit, provided that they do not exceed any prescribed statutory maxima for the time being in force. The material provisions of the relevant local Acts and the Road Traffic Act, 1930, contain no equality clause, and, accordingly, the defendants are not obliged to charge at the same rate for every passenger, and, indeed, they may permit certain passengers to travel free. The corporation's position in this respect is analogous to that of a person or body authorized to levy tolls or rates. There is ample authority to support the proposition that a person or body levying tolls or rates is not obliged to treat all persons alike, and that, therefore, it is entitled to charge some persons more than others and, indeed, remit the charge or toll altogether in some cases: *Hungerford Market Co.* v. *City Steamboat Co.*,[5] *Duke of Newcastle* v. *Worksop Urban Council*[6] and *Northampton Corporation* v. *Ellen.*[7]

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[3] [1892] 3 Ch. 242, 250; 8 T.L.R. 717.

[4] [1899] A.C. 293, 302, 303; 15 T.L.R. 370.

If the above contention be correct, then the defendants may *in their discretion* remit the whole or any part of the fares which they are authorized to charge, and provided that in exercising their discretion they did not fail to take into account relevant matters or, conversely, did not take into account irrelevant matters, or exercise their discretion in an unreasonable or irrational way, a decision reached by them in the exercise of that discretion ought not to be overridden by the court.

As to the second question, whether the means adopted in carrying the scheme into effect have infringed in any way the defendants' statutory powers, it is a misuse of language to describe the financing of this scheme as "a payment." What in reality has been done is to provide out of the one fund of the corporation moneys to meet expenses of the corporation, and the discharge of those expenses and liabilities falls on the corporation —they could be sued if they did not meet them. That one fund comprises a number of accounts, and a transfer of moneys from one department of the corporation to another is purely a matter of accounting. [Reference was made to section 52 of the Birmingham Corporation Act, 1903, sections 185 and 187 of the Local Government Act, 1933, and to *Allchin (Inspector of Taxes)* v. *Coulthard.*[8]]

If the statutes which Parliament has passed give the corporation power to adopt this scheme, and a discretion is left in the corporation as to the way in which they will carry it out, then it must be assumed that Parliament intended that the corporation should use those powers in the manner in which they have done. The fundamental question to be decided in this case is simply whether it is within the powers of the corporation to adopt a scheme of this kind. [Reference was also made to *North Eastern Gas Board* v. *Leeds Corporation.*[9]]

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[5] (1860) 3 E. & E. 365.

[6] [1902] 2 Ch. 145; 18 T.L.R. 472.

[7] [1904] 1 K.B. 299; 20 T.L.R. 168.

[8] [1942] 2 K.B. 228, 232.

Blennerhassett replied.

Cur. adv. vult.

October 15, 1954. VAISEY J. The plaintiff in this action, Gregory Vincent Prescott, is a ratepayer of the City of Birmingham. The defendants are the corporation of the said city, sued under their proper style and title of the Lord Mayor, Aldermen and citizens of the City of Birmingham. The action seeks declarations to the effect that a certain scheme which, having been approved and adopted by the corporation, has now been in force for upwards of a year, is illegal and ultra vires.

The facts are these: The corporation operate a transport undertaking in and about the City of Birmingham, as they have power to do under their private Acts of Parliament. That undertaking includes the running both of trams and of omnibuses. [His Lordship stated the effect of the council's resolution, and continued:] I will, in this judgment, refer to persons possessing the qualifications which I have mentioned as "old people."

I was informed that the number of old people in Birmingham is about 70,000, and that the number of those who have taken advantage of the scheme is about 40,000. The cost of the scheme was estimated at £90,000 per annum, and the experience of the first year of the operation of the scheme has established that such estimate was a correct one.

Some confusion has been introduced into the case by such inaccurate statements as that the sum of £90,000 has been or was intended to be actually paid out of the corporation's general rate fund to the corporation's transport undertaking. Of course, no such payment has been or could be made; the fact being that the transfer of £90,000 made or intended to be made from the corporation's general rate fund account to the corporation's transport account as representing the additional expenditure arising from the operation of the scheme was or would be a mere matter of inter-departmental book-keeping. The proper method of looking at the matter is explained very clearly by Lord Greene M.R. in *Allchin* (*Inspector of Taxes*) v. *Coulthard*,[1] as follows: "All receipts and "expenditure must be paid into and out of the general rate fund, "but for the purpose of the internal accounts of the borough "separate accounts showing the specified particulars must be "kept in respect of each undertaking. This was obviously

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[9] [1952] 2 T.L.R. 536.

[1] [1942] 2 K.B. 228, 232.

"necessary, since, if the only account kept had been that of the "general rate fund, it would have been impossible to ascertain "the financial position of the undertakings, but the obligation to "keep these accounts imposes no sort of restriction on the cor- "poration as to the way in which they are to deal with the profits "of the undertakings, any more than would be the case with an "ordinary trading company which, for the purposes of conveni- "ence, treated different branches of its undertakings as separate "entities for accountancy purposes."

The income of the corporation is therefore in actual fact one and indivisible, although derived from a variety of sources such as the rates collected from the ratepayers and the takings arising from the corporation's trading activities, transport, water supply and others. The totality of the corporation's liabilities is also one and indivisible.

Now it is obvious that if 40,000 of the users of its trams and omnibuses are excused from paying fares on parts of six days in every week, the corporation's income will inevitably be reduced by a substantial sum in the course of a year, and it is now known that the annual reduction amounts to £90,000. I am told that the transport undertaking is run at a heavy loss which now amounts to an accumulated total loss of no less than £700,000. That means that the earnings of the trams and omnibuses have been insufficient to meet the cost of running them, so that the deficit or balance of such cost has had to be met from other sources, and I think it follows that the £90,000 is in fact an addition to such deficit or balance. It might be thought that generosity (if that be the right word) to the old people would be more appropriately exercised by an undertaking which was making profits, or at least paying its way, than by one which is working at such a heavy loss. But the validity of the scheme now in question cannot be attacked on any such ground as that, because, as I have said, the income of the corporation is indivisible, and so also is the totality of its liabilities, and there is no reason why the corporation should not, if they think fit, arrange to increase the losses on any of its undertakings and in the proverbial manner make up what they lose on the swings out of what they gain on the roundabouts.

The licensing authority for the West Midland Traffic Area, being the appropriate licensing authority in the present case, granted the corporation leave to dispense with compliance with such of the conditions attached to their road services licences as precluded them from granting the facilities provided by the scheme. Such leave was expressed to be "subject to the payment by the corporation to the transport undertaking of the sum of £90,000 for the first year's operation of the concession." This, as I have already said, is an inaccurate description of what actually occurred or was contemplated. No payment has been or could be made by the corporation to the transport undertaking, which is merely the corporation itself under a different aspect.

The question which I have to decide seems to me to be simply this: whether the corporation, as a transport undertaking, can, with the leave of the appropriate licensing authority, discriminate between the users of its tramways and omnibuses by providing that some of such users should pay the authorized fares while others are excused from making any payment and so entitled to travel free. The plaintiff says, and I agree, that there is no statutory provision which in terms authorizes such discrimination, and the corporation say, and I agree, that there is no statutory prohibition of it. It seems to me that the matter falls to be decided on quite general grounds.

I was referred by counsel for the corporation to three cases bearing upon this point, of which the first is *Hungerford Market Co.* v. *City Steamboat Co.*,[2] of which it is sufficient for me to quote a few words from the judgment of Cockburn C.J.: "tolls must be fixed and appointed in order to communicate to the public or persons interested the maximum toll they can be called upon to pay; leaving the right of the company to lower or remit the tolls, if it otherwise exists, wholly untouched. We have therefore to consider whether a company entitled to take tolls in return for public service is bound, independently of express provision, to exact the same tolls from all persons alike, or is at liberty, if so minded, to remit the tolls, or any portion of them, to particular individuals at its pleasure and discretion." Then he enunciated what he described as a well-known axiom that "everyone is at liberty to renounce a right established in his favour."

Those observations were quoted with approval by Farwell J. in *Duke of Newcastle* v. *Worksop Urban Council*,[3] where the decision was that the lord of a manor owning a fair or market, so long as he did not charge unreasonable tolls, was not bound to charge all persons alike but might remit part of the toll to favoured persons.

Then there is *Northampton Corporation* v. *Ellen*,[4] where it was held by the Court of Appeal, reversing the judgment of Bigham J., that differentiations in the matter of charge between persons in one district and another for a supply of domestic water was not open to any objection; and Lord Collins M.R. indicated [5] that that case fell to be decided mainly on first principles, there being no clear statutory prohibition or authority in point.

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[2] (1860) 3 E. & E. 365, 380.

[3] [1902] 2 Ch. 145, 161; 18 T.L.R. 472.

[4] [1904] 1 K.B. 299; 20 T.L.R. 168.

I feel the force of these decisions, but I am not convinced that they apply to the present case. My doubt, and it is a very serious doubt, may be expressed by saying that the corporation seem to me to be attempting by this scheme to usurp the functions of the legislature, and to redress what they appear to consider to be a nation-wide grievance by local administrative methods. I feel bound to have regard to the probable consequences of my finding that such a scheme as this is within the corporation's powers, and to ask whether every other corporation operating a transport undertaking would not be forced by public opinion to follow the example of Birmingham by an equal or greater measure of generosity (again if that be the right word) to old people, irrespective of whether their undertaking was being run at a profit or a loss. If old people are to be financially helped partly by Parliament from the taxes and partly by municipalities from the rates, it seems to me that very unseemly competition would be set up between Parliament and the municipalities and between the municipalities themselves. The subsidizing of particular classes of society is, I think, a matter for Parliament, and for Parliament alone. The granting of special travel facilities to children, cripples, invalids, wounded servicemen and others seems to me to be permissible by reason of the special need for transport and the special difficulties of obtaining it which such travellers can plead owing to their tender years or physical disabilities. But plenty, perhaps the majority, of women of 65 and over and men of 70 and over find no difficulty whatsoever either in walking or in mounting a tram or omnibus, and it is obvious (and I emphasize this) that it is the economic disability of these old people and nothing else which the corporation are seeking to alleviate by their scheme. Aged persons not already recipients of financial subventions are not within the scheme at all.

The fact is that the scheme puts an annual sum of £90,000 drawn from the pockets of the total body of ratepayers at the disposal of a limited class of persons whose moral claim to free transport and other facilities may be less urgent than that of others outside the scheme, such as the parents of large families, shop assistants and others. I have no doubt that the promoters and supporters of this scheme are actuated by feelings of genuine sympathy, and are not consciously acting capriciously; but I cannot think that the corporation have power to depart on so large a scale from that principle of equality which is normally so important an ingredient of justice. If old people can be excused from paying their tram and omnibus fares, I do not see why they should not be excused from all local taxation whatsoever, nor indeed do I see why the £90,000 in the present case or any other sum drawn from the general rate fund should not be shared out among the old people if this scheme is within the corporation's powers, for the result to the corporation would be just the same, and the payment in cash rather than in tram tickets might be just as welcome to the recipients. I do not overlook the fact that the corporation is a body incorporated by royal charter and therefore, prima facie, has more ample powers than one which is the creation of statute; but I think that the corporation have no general inherent power to offer free seats in their vehicles or other benefits in money or money's worth to particular individuals or to particular classes of individuals, and to discriminate between the citizens of Birmingham on the large scale and to the wide extent which they do in the present case. Where is the process of discrimination and favouritism to stop? Let me suppose that the council of the corporation were honestly of the opinion that the success of a particular political party at the polls was essential to the public welfare. Would they be entitled to confer pecuniary benefits on the supporters of that party? Plainly not; but where is the difference in principle between that and the proposals of the present scheme? For myself, I cannot see it. Of course, there is no element of venality or corruption here, but only, if I am right, an excess of misplaced philanthropic zeal.

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[5] [1904] 1 K.B. 316.

I am told that a good many other corporations have adopted or are proposing to adopt schemes similar to this one. It was suggested that the point should be raised on one of the corporation's private Bills,[6] and it was also suggested that that course was not followed on account of the "time factor," whatever that may mean. There was, of course, the obvious risk that if express parliamentary powers were sought, they might have been refused. Whether they would or would not be refused is not a matter upon which I ought to express any opinion. I reach my decision in this case with hesitation, for I think that the point is by no means free from doubt, and also with some regret, for any help given to the old people, whether in Birmingham or elsewhere, is likely, in my judgment, to be very well deserved. The only question is whether this is the way to achieve that end. After coming to the conclusion that it is not, I must declare that the scheme is invalid and ultra vires, and the plaintiff will have liberty to apply for an injunction.

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[6] [At the time when the scheme was under discussion a private Bill was in course of preparation: J.A.G.]

Judgment for the plaintiff.

J. A. G.

The defendants appealed.

M. E. Rowe Q.C. and *Harold Lightman* for the defendant corporation. The question is whether the defendants' scheme for providing free travel facilities for old people on their transport system is legal and, if it is, whether the means for putting it into force are legal. Three matters arise in connexion with the question whether the scheme is ultra vires. First, have the defendants any power to vary the charges payable as between different persons or to remit all charges for certain categories of persons? Secondly, if they have such powers, is there any limitation on their exercise? Thirdly, if there is any such limitation, was it transgressed in this case? The defendants' private Acts do not expressly authorize the defendants to provide free travel, but the charging clauses are wide enough to give power to remit charges. It is established that where an undertaking has power to charge, it can remit the charges in whole or in part in the absence of any express statutory prohibition. The powers in regard to fares conferred by sections 31, 34, 38 and 39 of the Birmingham Corporation Act, 1903, and section 12 (1) of the Birmingham Corporation Act, 1914, show that the defendants have power to charge varying rates for transport. Concessionary fares have always been granted to children and workmen and to other categories, such as the blind. If Vaisey J.'s decision were right, all such concessions would be illegal. There are 25 other local authorities who grant concessions to old people. In order to introduce the scheme licences had to be and were obtained under the Road Traffic Act, 1930. The decisions in *Hungerford Market Co.* v. *City Steamboat Co.*,[1] *Duke of Newcastle* v. *Worksop Urban Council*[2] and *Northampton Corporation* v. *Ellen*[3]

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[1] (1860) 3 E. & E. 365.

[2] [1902] 2 Ch. 145; 18 T.L.R. 472.

[3] [1904] 1 K.B. 299; 20 T.L.R. 168.

C. A.

1954

PRESCOTT
v.
BIRMINGHAM
CORPORATION.

show that, where a local Act confers power to make charges, there is a power to differentiate in the charges made to different classes of persons, if the Act in question does not expressly provide that all persons shall be charged equally.

The next question is whether, there being power to discriminate in fares, there is any limit on that power. It appears from *Associated Provincial Picture Houses Ld.* v. *Wednesbury Corporation* [4] and *Short* v. *Poole Corporation* [5] that the court will only interfere with a bona fide exercise of the power if the corporation in question has taken into account matters not germane or has not taken into account any relevant matter, or has acted wholly unreasonably. Vaisey J. did not apply his mind to the question whether Parliament had given to local authorities generally, or to the defendants in particular, a discretion as regards fares. If it has done so, the defendants in exercising such discretion cannot be usurping the functions of Parliament. There is nothing in the facts of the case to justify the judge's statement that the defendants were doing so. The defendants are authorized to run their transport undertaking for the benefit of the inhabitants of Birmingham. Their power to charge differential fares includes power to make no charge at all to certain classes of persons. So long as any differential rate is made with the intention of making the undertaking more useful to the inhabitants, it is authorized by the local Acts. There is no principle which prevents a local authority from benefiting any particular section of the inhabitants if the authority's motive in doing so is reasonable. Whether the defendants' scheme is intra or ultra vires cannot depend on whether a farthing or nothing is charged. If the defendants can make as big a reduction as they please in fares, they must be able to charge nothing. The *Hungerford Market* case [6] covers this scheme.

It is not contended that the defendants could distribute among the old people the sum of £90,000, which this scheme will cost the ratepayers, since there is no power to do so, but there is a power to remit fares. Nor would the payment of a cash benefit achieve the end desired, which is to facilitate travel for old people. The cash might be used for other purposes. There is no evidence that the defendants in framing this scheme took into account matters which should not have been taken into account or that they failed to take into account any relevant matters. It cannot

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[4] [1948] 1 K.B. 223; 63 T.L.R. 623.

[5] [1926] Ch. 66; 42 T.L.R. 107.

[6] 3 E. & E. 365.

C. A.
1954

PRESCOTT
v.
BIRMINGHAM
CORPORATION.

be said that they have acted unreasonably. The defendants have, in this matter, discretionary powers, and it would not be right for the court to interfere with their exercise unless they had been wrongly exercised.

A further question raised by the plaintiff is whether, if the scheme is valid, the defendants are entitled to use the general rate fund to implement it. Under the Birmingham Corporation Act, 1929, s. 62, all liabilities are paid out of the general rate fund, although under section 63 (1) separate accounts are kept for each undertaking of the corporation. The Local Government Act, 1933, s. 185, contains similar provisions which apply to all local authorities.

Frank Blennerhassett for the plaintiff. With regard to the defendants' contention that they can remit all fares, it is submitted that (1) the scheme is not a simple remission of fares; (2) if it is, it is not authorized by the local Acts of the defendants; (3) this is a welfare scheme and the welfare legislation lays down the duties of a local authority in welfare matters and restricts them to those duties; (4) the scheme is by inference prohibited by the defendants' private Acts.

With regard to the plaintiff's first contention; if this were a simple remission of fares, its cost would be reflected in the income of the undertaking and no transfer would be required from the general rate fund. There is no statutory authority for the transfer of £90,000 from the general rate fund. Section 52 (2) of the Birmingham Corporation Act, 1903, authorizes payment out of the rate fund to meet a deficit. It does not authorize a payment to meet a deficit which the defendants intend to create. Looking at the scheme as a whole, it is more than a scheme for the remission of fares. If there is a power to remit, it does not authorize the doing of such consequential things as are involved in this scheme, as, for example, payment to other transport bodies in order that they should honour passes issued to old people. Here the defendants are trustees for the public. The position is different from that in *Duke of Newcastle* v. *Worksop Urban Council* [7]; there the remission was of a payment due to the duke. The decision in *Northampton Corporation* v. *Ellen* [8] is not an authority for the case of total remission. It is only an authority for the variation of charges based on the cost of the services rendered.

Secondly, if the defendants have power to remit fares, that power does not authorize this scheme. It is not within section 104 of the Road Traffic Act, 1930. The only considerations which have guided the defendants have been economic, in that they considered that these old people were in need of financial assistance. The defendants were not exercising any discretion under section 104. The defendants are authorized to run a transport undertaking, and in exercising their powers they must be guided by business principles, and in deciding on the fares to be charged they must be guided by considerations proper in running a commercial undertaking. The decision in *Roberts* v. *Hopwood*[9] is relied on.

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[7] [1902] 2 Ch. 145.

[8] [1904] 1 K.B. 299.

The fact that no fares or reduced fares are charged for children may be justified on the ground that such a reduction is in the interest of the transport undertaking. Under the National Assistance Act, 1948, the duty of making financial provision for the aged is thrown on the central government. The duties imposed on local authorities by section 29 do not include the provision of services for the aged.

M. E. Rowe Q.C. in reply. The plaintiff has suggested that this scheme is not connected with the transport undertaking, but is a welfare scheme. There is no evidence of that. The defendants are not bound to try to make a profit from running their transport undertaking. They are providing a public service and in fixing fares they are entitled to consider the economic circumstances of the public. The defendants' discretion is not unlimited, but they are entitled to take into consideration the fact that some of their citizens are unable, owing to poverty, to take advantage of the transport service and accordingly to provide them with facilities for free travel: *Northampton Corporation* v. *Ellen.*[10] The decisions in *Roberts* v. *Hopwood*[11] and *Associated Provincial Picture Houses Ld.* v. *Wednesbury Corporation*[12] are distinguishable. The onus is on the plaintiff to show that this is not a genuine transport scheme. In this case it is not a question of wages but of the proper running of a public service. The defendants have power to remit fares, and there is no evidence that, in exercising that power, they have been actuated by any motive other than a desire to make their transport service a better service for the inhabitants of Birmingham.

Cur. adv. vult.

November 30. JENKINS L.J. read the following judgment of the court. This is an appeal by the Lord Mayor, Aldermen and citizens of the City of Birmingham from a judgment of Vaisey J. dated October 15, 1954, in an action brought against them by the plaintiff, Gregory Vincent Prescott, a ratepayer of the City of Birmingham, whereby the judge made a declaration to the effect that a scheme adopted and approved by the defendants by resolution dated January 6, 1953, for the provision of free transport facilities for certain categories of old people mentioned in the scheme was illegal as being beyond the powers of the defendants.

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[9] [1925] A.C. 578; 41 T.L.R. 436.

[10] [1904] 1 K.B. 299.

[11] [1925] A.C. 578.

[12] [1948] 1 K.B. 223; 63 T.L.R. 623; [1947] 2 All E.R. 680.

[His Lordship stated the facts and the relevant provisions of the Birmingham Corporation Acts and of the Road Traffic Act, 1930, set out above, and continued:] Inasmuch as the Birmingham Corporation Act, 1954, did not become law until after action brought, it cannot affect the question whether the scheme was or was not invalid when the plaintiff commenced his action, or his justification for bringing it, if the scheme was invalid as the law then stood; though if the Act of 1954 could be shown to have had the effect of validating a previously invalid scheme, or of authorizing the adoption of an identical scheme, it would have an important bearing on the nature and extent of the relief which could properly be granted to the plaintiff.

In our view, however, section 55 of the Act of 1954 did not affect the issue as to the validity or invalidity of the scheme. Whether the defendants' power of charging fares is treated as referable to section 31 of the Act of 1903, section 12 (1) of the Act of 1914, section 104 of the Road Traffic Act, 1930, or section 55 of the Act of 1954, the position at all material times appears to have been that the defendants were, and are, authorized by statute to maintain and operate their transport undertaking (which has, we understand, latterly become exclusively a motor omnibus as distinct from a tramway or trolley-bus undertaking) and to charge such fares to passengers travelling on their vehicles as the defendants think fit, subject to any prescribed statutory maxima for the time being in force, and subject also to their obligation under the Road Traffic Act, 1930, to adhere to any scales of fares fixed by the licensing authority as part of the conditions attached to the defendants' road service licences. The licensing authority's interest in the matter is to see that the fares charged are reasonable. Hence the importance attached by that authority, when granting the dispensation, to the stipulation that the dispensation was to be subject to the payment by the city council to the transport undertaking of the sum of £90,000 for the first year's operation of the scheme, which must, we think, be understood as requiring, in effect, that the cost of the scheme should be met out of the general rate fund, as opposed to being provided by means of an increase in fares. It would seem that, even on the assumption that the scheme was valid, the defendants might be in a difficulty in the event of the licensing authority insisting on conditions as to fares which would prevent effect being given to it. On the other hand, it is not suggested that, on the assumption that the scheme was otherwise invalid, it could be validated by the approval of the licensing authority.

As to the repeal of section 52 (2) of the Act of 1903 by section 51 of the Act of 1954, this does not, we think, in any material way affect the issue. The effect of such repeal seems to be merely to bring the defendants' transport undertaking into line with their various other undertakings for accounting purposes, the system now in force being that prescribed by sections 62 and 63 of the Birmingham Corporation Act, 1929, the effect of which (to put it very shortly) is that while separate accounts are kept in respect of each undertaking under the latter section, all revenue and expenditure chargeable to revenue in respect of every undertaking is carried to or, as the case may be, paid out of, the general rate fund. But, however the accounts are managed, it is clear that any deficit resulting from the operation of the transport undertaking, so far as not made good out of subsequent profits resulting from such operation, or from surpluses derived from other sources, must ultimately be provided out of the general rate or, in other words, out of the pockets of the general body of ratepayers. It seems clearly to have been the intention of the defendants that the £90,000, estimated annual cost of the scheme, should not be charged in account against the transport undertaking, but should be borne by the general rate, and it was included in the defendants' schedule of estimates for general rate for the year from April 1, 1953, to March 31, 1954. We understand that the accounts of the transport undertaking showed at the date of the resolution approving the scheme, and still show, a substantial accumulated deficit, amounting to some £700,000, though there has latterly been some slight degree of current profit. There was, thus, never any question of the transport undertaking being able itself to provide the £90,000 estimated annual cost of the scheme.

We think we have now sufficiently noticed the relevant circumstances and statutory provisions bearing upon the question to be decided, namely, whether the disputed scheme is, as Vaisey J. has held, illegal as being beyond the powers of the defendants.

C. A.

1954

Prescott
v.
Birmingham
Corporation.

Mr. Rowe's argument for the defendants has all the attractions of simplicity. It is to this effect: (1) Under the relevant statutory provisions the defendants are empowered (not enjoined) to charge fares, and are, moreover, empowered to charge such fares as they think fit, provided that they do not exceed any prescribed statutory maxima for the time being in force. The legislation contains no equality clause. Therefore the defendants are not obliged to charge at the same rate for every passenger, but can charge different rates for different passengers, or, indeed, allow some passengers to travel free while charging others. For that matter, as the provisions in regard to the charging of fares are permissive and not imperative, the defendants could, if so minded, allow everyone to travel free of charge and defray the entire cost of their transport undertaking out of the rates. By way of authority for the proposition that, in the absence of some equality clause or necessary implication to the like effect, a person or body authorized to levy tolls or rates is not obliged to treat equally everyone who becomes liable to the toll or rate, but can charge some more than others, or, indeed, charge some while remitting the toll or rate altogether as regards others, Mr. Rowe refers us to the three cases of *Hungerford Market Co.* v. *City Steamboat Co.*,[1] *Duke of Newcastle* v. *Worksop Urban Council*,[2] and *Northampton Corporation* v. *Ellen*.[3] It follows, says Mr. Rowe, that the defendants in this case have power, under the relevant legislation, to discriminate between different passengers or categories of passengers on the defendants' vehicles by allowing some to travel free while charging fares for others.

(2) Mr. Rowe admits that acceptance of the proposition that the defendants have power to discriminate in this way does not conclude the case in his favour, for it still remains to consider whether the adoption of the discriminatory scheme now in question would be a proper exercise of the power. He does not contend that a purely arbitrary or capricious course of discrimination would be permissible, but he says that, given the power, the question whether a particular mode of exercising it is a proper one is primarily a matter for the discretion of the defendants, and submits that the court should not override a decision reached by the defendants in exercise of that discretion (apart from mala fides, of which, of course, there is no suggestion here), unless satisfied that the defendants, in exercising it, failed to take into

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[1] 3 E. & E. 365.

[2] [1902] 2 Ch. 145; 18 T.L.R. 472.

[3] [1904] 1 K.B. 299; 20 T.L.R. 168.

account relevant matters, or took into account irrelevant matters, or exercised it, in short in such an unreasonable or irrational fashion that there was in truth no real exercise of it at all. By way of authority for this proposition Mr. Rowe refers us to *Short* v. *Poole Corporation* [4] and *Associated Provincial Picture Houses Ld.* v. *Wednesbury Corporation.*[5]

(3) Mr. Rowe finally submits that, given that the defendants did have a discretionary power of discrimination, there is no ground for holding that the defendants have exercised their discretion improperly in using the power for the purpose of introducing the scheme now under consideration. He says it appears from the report of the general purposes committee that all relevant matters such as hours, routes and so forth were considered. He says, further, that the age, means and health of potential passengers are all matters relevant to be taken into account in deciding whether any, and if so what, discrimination should be made in their favour. He adds that the transport undertaking is not to be regarded purely as a business enterprise, and that the function of the defendants in relation to it is to provide a transport service (whether remunerative or not) for the benefit of the inhabitants of their city, and says that any scheme of discrimination calculated to make the service more useful to those inhabitants is intra vires the defendants. He gives as examples of legitimate discrimination the carriage of workmen at reduced rates (which was, indeed, enjoined by the Act of 1903), the carriage of children free or at half fares according to age, and the practice, which has apparently been pursued by the defendants, of carrying blind and disabled persons free, and submits that the scheme now in question is no more than another example of equally legitimate discrimination. In sum, he submits that it is a proper exercise of the discretionary power to grant rights of free travel to categories of persons defined by reference to advanced age and limited means, as are the "old people" for whose benefit the scheme now in question was devised.

We cannot accept Mr. Rowe's argument. We do not doubt his proposition (for which there appears to be clear authority) that in the absence of an equality clause, or some necessary implication to the like effect, a person or body, having statutory power to charge tolls or rates, or, for that matter, fares, is entitled to discriminate in the charges made to different people. But this, as a general proposition, only means that the person discriminated against cannot object merely on the ground that he is charged more than the other man. It does not necessarily follow that nobody else can object. No doubt that might be the position, if the power was exercisable simply and solely for the benefit of the person or body on whom it was conferred. But take the case of a trustee running an omnibus service with a statutory power to charge fares to passengers, and no equality clause. If such a trustee chose, from motives of philanthropy, to allow some person or class of persons, considered by him to be badly off, to travel free or at reduced fares, it may be that passengers charged the full fare could not object on that account. But we apprehend that the cestuis que trustent certainly could. A similar situation might arise as between a company, or the directors of a company, running an omnibus undertaking with a similar right to charge fares, and the shareholders of such company. See the *Hungerford Market* case,[6] where Cockburn C.J. said: "If the service be rendered, and the accommodation "afforded, the obligation of the company is fulfilled. If it omit "to exact the toll which is the consideration for the service, the "shareholders would seem to be the only persons who can have "a right to complain."

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[4] [1926] Ch. 66; 42 T.L.R. 107.

[5] [1948] 1 K.B. 223; 63 T.L.R. 623; [1947] 2 All E.R. 680.

Local authorities are not, of course, trustees for their ratepayers, but they do, we think, owe an analogous fiduciary duty to their ratepayers in relation to the application of funds contributed by the latter. Thus local authorities running an omnibus undertaking at the risk of their ratepayers, in the sense that any deficiencies must be met by an addition to the rates, are not, in our view, entitled, merely on the strength of a general power, to charge different fares to different passengers or classes of passengers, to make a gift to a particular class of persons of rights of free travel on their vehicles, simply because the local authority concerned are of opinion that the favoured class of persons ought, on benevolent or philanthropic grounds, to be accorded that benefit. In other words, they are not, in our view, entitled to use their discriminatory power as proprietors of the transport undertaking in order to confer out of rates a special benefit on some particular class of inhabitants whom they, as the local authority for the town or district in question, may think deserving of such assistance. In the absence of clear statutory authority for such a proceeding (which to our mind a mere general power to charge differential fares certainly is not) we would, for our part, regard it as illegal, on the ground that, to put the matter bluntly, it would amount simply to the making of a gift or present in money's worth to a particular section of the local community at the expense of the general body of ratepayers. The case of *Northampton Corporation* v. *Ellen* [7] does not, in our view, assist the defendants, for in that case the object of reducing the water rate as regards one district and not as regards another district was not to confer a benefit on the inhabitants of the former district as compared with the inhabitants of the latter, but to secure that the inhabitants of the former should, through the medium of the district rate, make a fair contribution towards the cost of the water supply.

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[6] 3 E. & E. 365, 381.

We are not persuaded by Mr. Rowe's argument to the effect that the relevant legislation would allow the defendants to charge no fares at all to anyone and to finance their transport undertaking entirely out of the rates. We think it is clearly implicit in the legislation, that while it was left to the defendants to decide what fares should be charged within any prescribed statutory maxima for the time being in force, the undertaking was to be run as a business venture, or, in other words, that fares fixed by the defendants at their discretion, in accordance with ordinary business principles, were to be charged. That is not to say that in operating their transport undertaking the defendants should be guided by considerations of profit to the exclusion of all other considerations. They should, no doubt, aim at providing an efficient service of omnibuses at reasonable cost, and it may be that this objective is impossible of attainment without some degree of loss. But it by no means follows that they should go out of their way to make losses by giving away rights of free travel.

As to the instances of legitimate discrimination given by Mr. Rowe, the concession in favour of workmen is enjoined by statute, and therefore does not advance his argument. The concessions in favour of children (who travel free or at half-fares according to age) are of a kind commonly, if not universally, accorded by transport undertakings, and, we should have thought, readily justifiable on business principles. The practice of allowing free travel to blind and disabled persons may, or may not, be strictly justifiable, but may perhaps be classed as a minor act of elementary charity to which no reasonable ratepayer would be likely to object.

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[7] [1904] 1 K.B. 299.

In our opinion the scheme now in question goes beyond anything which can reasonably be regarded as authorized by the discretionary power of fixing fares and differentiation in the fares charged to different passengers or classes of passengers possessed by the defendants under the relevant legislation, and is, accordingly, ultra vires the defendants.

In the course of the argument, we asked Mr. Rowe whether, if the omnibus undertaking in Birmingham had been owned and operated by some other concern and not by the defendants themselves, the defendants could have paid £90,000 per annum to the other concern in consideration of their operating a scheme of free travel for old people on the lines of the scheme now in question. Mr. Rowe admitted that the defendants could not have done this. It seems to us that in substance and in result the scheme, as it actually stands, does not materially differ from a transaction of that kind, the only difference being that, as the omnibus undertaking is owned and operated by the defendants themselves, the subsidy out of the general rate required to defray the cost of the free travel facilities is to be applied by the defendants themselves in the provision of those facilities, instead of being paid to some other body to be so applied. It is not without significance that the scheme as actually adopted did in fact contemplate that some payment to the Midland Omnibus Co. Ld. would, or might, be necessary as consideration for their agreeing to honour the defendants' free travel passes.

As appears from what we have said above, we think the disputed scheme is wholly beyond the powers of the corporation. But, in our view, the scheme fares no better if its adoption is considered as a purported exercise by the defendants of their discretion in a matter not, on the face of it, necessarily outside the general ambit of the discretionary power of differentiation of fares conferred on them by the relevant legislation. What the defendants did was simply to form the opinion that women of or over the age of 65 and men of or over the age of 70, fulfilling one or other of the conditions as regards means referred to in the scheme, ought to be allowed free travel facilities, and then call for and adopt a scheme giving effect to that opinion. If we are right in thinking that, after all allowance is made for their special position as a local authority, the defendants owe a duty to their ratepayers to operate their transport undertaking substantially on business lines, we think it must necessarily follow that, in adopting the scheme, the defendants misapprehended the nature and scope of the discretion conferred on them, and

C. A.
1954
PRESCOTT v. BIRMINGHAM CORPORATION.

mistakenly supposed that it enabled them to confer benefits, in the shape of rights of free travel, on any class or classes of the local inhabitants appearing to them to be deserving of such benefits by reason of their advanced age and limited means. Accordingly, if the case is to be regarded as turning upon the question whether the decision to adopt the scheme was a proper exercise of a discretion conferred on the defendants with respect to the differential treatment of passengers in the matter of fares. the answer, in our opinion, must be that it was not a proper exercise of such discretion. We think some support for this view is to be derived from the speeches in the House of Lords in *Roberts* v. *Hopwood.*[8]

For these reasons we are of opinion that the judge came to a right conclusion in this case, and we would accordingly dismiss the appeal.

Appeal dismissed.
Leave to appeal to the House of Lords.

Solicitors: *Sharpe, Pritchard & Co. for J. F. Gregg, Town Clerk, Birmingham; Stanley & Co. for R. Evans Parr & Co., Birmingham.*

B. A. B.

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[8] [1925] A.C. 578; 41 T.L.R. 436.

C. A.
1954
Dec. 20.

Evershed M.R., Jenkins and Hodson L.JJ.

HARPER AND ANOTHER *v.* SECRETARY OF STATE FOR THE HOME DEPARTMENT.

[1954 H. No. 4249.]

Parliament—Constituencies—Boundary Commission—Report—Validity—Discretion of commission—House of Commons (Redistribution of Seats) Act, 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 66), *ss.* 2, 3; *Sch. II, rr.* 1, 4, 5, 6.

Crown Proceedings—Proceedings against Crown—Injunction—Ex parte injunction sought to restrain submission of draft Order in Council to Her Majesty—Whether Secretary of State for the Home Department rightly made defendant—Crown Proceedings Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 44), *s.* 21.

On November 10, 1954, the Boundary Commission, pursuant to the provisions of section 2 (2) of the House of Commons (Redistribution of Seats) Act, 1949, submitted to the Home Secretary a report which recommended certain changes in the boundaries of certain constituencies. He, pursuant to the provisions of section 2 (5) of the Act, laid the report before Parliament together with a number of draft Orders in Council, including the one now in question entitled "Draft Parliamentary Constituencies (Manchester, Oldham "and Ashton-under-Lyme) Order, 1954," giving effect to the commission's recommendations. These draft Orders had been approved by both Houses of Parliament, and the Home Secretary, the defendant, was proposing to submit them to Her Majesty in Council. The result of implementing the report would be that both plaintiffs would cease to be electors in their present constituency and be transferred to another.

The plaintiffs claimed a declaration that the report of the commission did not comply with the rules set out in the Second Schedule to the Act; that it was not, therefore, a "report under "the Act" within the meaning of section 2 (5); and that the defendant was not bound by section 3 (4) to submit the draft Order to Her Majesty in Council. They also asked for, and were granted by Roxburgh J., an interim ex parte injunction restraining the defendant until after a specified date from submitting the draft Orders to Her Majesty in Council. On appeal against that injunction:—

Held, that there was no ground for saying that the report of the commission was any departure from the rules laid down in the Act of 1949 which the commission had to have in mind. The method adopted by the commission in fixing the boundaries of constituencies appeared on the face of the report. If the method adopted by the commission was one which Parliament itself did not like, it would have modified or rejected it. On the true construction of the rules in the Second Schedule to the Act and of the whole Act, in so far as the matter was not within the discretion of the commission, it was a matter for Parliament to determine. Parliament did not contemplate that, when reports were presented, it would be competent for the court to determine and pronounce whether a particular line which had commended itself to the commission was right. The ex parte injunction should not have been granted.

Rex v. *Electricity Commissioners* [1924] 1 K.B. 171; 39 T.L.R. 715; *Attorney-General of New South Wales* v. *Trethowan* [1932] A.C. 526 and *Regina* v. *Lords Commissioners of the Treasury* (1872) L.R. 7 Q.B. 387 distinguished.

Per Evershed M.R. I am not satisfied, though I express no final view, that in any event an injunction could be obtained against the Secretary of State for the Home Department, having regard to the terms of the Crown Proceedings Act, 1947.

Decision of Roxburgh J. reversed.

APPEAL from Roxburgh J.

The first plaintiff, Richard Stephenson Harper, was Lord Mayor of the City of Manchester and a parliamentary elector in the existing borough constituency of Manchester (Gorton). The second plaintiff was a councillor of the City of Manchester and an elector in the same constituency of Manchester (Gorton). On

November 10, 1954, the Boundary Commission for England presented its First Periodical Report (Cmd. 9311) pursuant to section 2 (1) of the House of Commons (Redistribution of Seats) Act, 1949.[1] The commission, by paragraph 8 of the report,

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[1] House of Commons (Redistribution of Seats) Act, 1949, s. 1 (1): "For "the purpose of the continuous review of the distribution of seats at parliamentary elections, there shall be four permanent Boundary Commissions, "namely, a Boundary Commission for England, a Boundary Commission for "Scotland, a Boundary Commission for Wales and a Boundary Commission "for Northern Ireland."

S. 2 (1): "Each Boundary Commission shall keep under review the representation in the House of Commons of the part of the United Kingdom with "which they are concerned and shall, in accordance with the next following "subsection, submit to the Secretary of State reports with respect to the whole "of that part of the United Kingdom, either—(*a*) showing the constituencies "into which they recommend that it should be divided in order to give effect "to the rules set out in the Second Schedule to this Act; or (*b*) stating that, "in the opinion of the Commission, no alteration is required to be made in "respect of that part of the United Kingdom in order to give effect to the "said rules."

Subs. (3): "Any Boundary Commission may also from time to time submit "to the Secretary of State reports with respect to the area comprised in any "particular constituency or constituencies in the part of the United Kingdom "with which they are concerned, showing the constituencies into which they "recommend that that area should be divided in order to give effect to the "rules set out in the said Second Schedule."

Subs. (5): "As soon as may be after a Boundary Commission have submitted a report to the Secretary of State under this Act, he shall lay the "report before Parliament together, except in a case where the report states "that no alteration is required to be made in respect of the part of the "United Kingdom with which the Commission are concerned, with the draft "of an Order in Council for giving effect, whether with or without modifications, to the recommendations contained in the report."

S. 3 (1): "A report of a Boundary Commission under this Act showing "the constituencies into which they recommend that any area should be "divided shall state, as respects each constituency, the name by which they "recommend that it should be known, and whether they recommend that it "should be a county constituency or a borough constituency."

Subs. (2): "The draft of any Order in Council laid before Parliament by "the Secretary of State under this Act for giving effect, whether with or "without modifications, to the recommendations contained in the report of a "Boundary Commission may make provision—(*a*) for any matters which "appear to him to be incidental thereto or consequential thereon; . . ."

Subs. (3): "Where any such draft gives effect to any such recommendations with modifications, the Secretary of State shall lay before Parliament "together with the draft a statement of the reasons for the modifications."

Subs. (4): "If any such draft is approved by resolution of each House of "Parliament, the Secretary of State shall submit it to His Majesty in "Council."

Subs. (5): "If a motion for the approval of any such draft is rejected by "either House of Parliament or withdrawn by leave of the House, the Secretary "of State may amend the draft and lay the amended draft before Parliament, "and if the draft as so amended is approved by resolution of each House of "Parliament, the Secretary of State shall submit it to His Majesty in Council."

Subs. (6): "Where the draft of an Order in Council is submitted to His stated that under rule 1 of the commission's instructions the number of constituencies in England should not be substantially greater or less than 506, after allocating the appropriate number of seats to Scotland and Wales; and they allocated seats provisionally to administrative counties with their associated county boroughs on the basis of one seat for each complete unit of electors, the unit representing the average electorate in England, namely, 57,122, being determined by dividing the total English electorate, viz., 28,909,108 by 506. By paragraph 9 the report continued: " Our aim was to create 506 constituencies, each of " which would be at or near the electoral quota without cutting " across local government boundaries. Where the grouping of

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" Majesty in Council under this Act, His Majesty in Council may make an " Order in terms of the draft which shall come into force on such date as may " be specified therein and shall have effect notwithstanding anything in any " enactment: . . ."

Subs. (7): " The validity of any Order in Council purporting to be made " under this Act and reciting that a draft thereof has been approved by " resolution of each House of Parliament shall not be called in question in " any legal proceedings whatsoever."

Second Schedule: " Rules for Redistribution of Seats."

R. 1: " The number of constituencies in the several parts of the United " Kingdom set out in the first column of the following table shall be as stated " respectively in the second column of that table—

" *Part of the* " *United Kingdom*	*No. of Constituencies*
" Great Britain	Not substantially greater or less than 613.
" Scotland	Not less than 71.
" Wales	Not less than 35.
" Northern Ireland	12."

R. 2: " Every constituency shall return a single member."

R. 4.—" (1) So far as is practicable having regard to the foregoing rules— " (*a*) in England and Wales,—

" (i) no county or any part thereof shall be included in a constituency " which includes the whole or part of any other county or the whole or part " of a county borough or metropolitan borough; . . ."

R. 5: " The electorate of any constituency shall be as near the electoral " quota as is practicable having regard to the foregoing rules; and a Boundary " Commission may depart from the strict application of the last foregoing rule " if it appears to them that a departure is desirable to avoid an excessive " disparity between the electorate of any constituency and the electoral quota, " or between the electorate thereof and that of neighbouring constituencies in " the part of the United Kingdom with which they are concerned."

R. 6: " A Boundary Commission may depart from the strict application of " the last two foregoing rules if special geographical considerations, including " in particular the size, shape and accessibility of a constituency, appear to " them to render a departure desirable."

R. 7: " For the purpose of these rules—

" (*a*) the expression ' electoral quota ' means—

" (i) in the application of these rules to a constituency in Great Britain, " a number obtained by dividing the electorate for Great Britain by the " number of constituencies in Great Britain existing on the enumeration date; "

C. A.
1954

HARPER
v.
HOME
SECRETARY.

"the local population permitted of this, the task was simple. "The numerous cases where it did not called for special consideration, the choice lying between departing substantially "from the quota or disregarding boundaries. In many instances "we decided in exercise of the discretion given to us in rule 6 "that we would be justified in recommending the creation or "continuance of constituencies with electorates substantially "below or in excess of the electoral quota but in no case have "we recommended the creation of a constituency with an "electorate in 1953 of less than 40,000 or more than 80,000."

The commission finally recommended the division of England into 511 constituencies.

The commission recommended a number of alterations in the boundaries of constituencies and, in particular, recommended the inclusion of part of the administrative county of Lancaster, namely, the urban district of Failsworth, in the borough constituency of Manchester (Openshaw), and further the inclusion of the urban district of Audenshaw and Denton, being parts of the county, in the borough constituency of Manchester (Gorton). The result of the proposed changes was that the first plaintiff would be removed from the existing constituency of Gorton with an electorate of 56,090 to the constituency of Withington with an electorate of 62,048, and the second plaintiff from the constituency of Gorton to that of the proposed constituency of Openshaw with an electorate of 59,129. The plaintiffs contended that as a result their respective votes would be less valuable, and instead of being represented by a Member of Parliament whose interests were identified with the City of Manchester, they would be represented by a member with differing and possibly conflicting interests between the city and county.

The defendant, the Secretary of State for the Home Department, had, before the issue of the writ in this action, laid the commission's report before Parliament, together with a number of draft orders to give effect to its recommendations, one being a draft Order in Council entitled "Draft Parliamentary Constituencies (Manchester, Oldham and Ashton-under-Lyme) "Order, 1954," for giving effect to the recommendations in the report to which the plaintiffs objected; the draft order had been approved by a resolution of each House of Parliament; and the defendant was proposing to submit the order to Her Majesty in Council on Tuesday, December 21, 1954.

On Friday, December 17, 1954, the plaintiffs issued the writ in this action by which they claimed: (i) a declaration that the report of the Boundary Commissioners for England dated November 10, 1954, submitted to the Secretary of State under the provisions of the House of Commons (Redistribution of Seats) Act, 1949, was not made in accordance with, and did not comply with, the rules set out in the Second Schedule to that Act, and that the report was not a report under the Act within the meaning of section 2 (5) thereof; (ii) a declaration that the defendant was not bound by section 3 (4) of the Act to submit, and ought not to submit, to Her Majesty in Council a draft Order in Council entitled "Draft Parliamentary Constituencies (Manchester, Oldham and Ashton-under-Lyme) Order, 1954," giving effect to the recommendations contained in the report; (iii) an injunction restraining the defendant from submitting the draft Order in Council to Her Majesty in Council.

On the same day the plaintiffs applied ex parte to Roxburgh J. for an interim injunction. The judge made an order restraining the defendant until after Tuesday, December 21, or until further order, from presenting to Her Majesty in Council a draft of the order which purported to have been made under section 3 (2) of the Act of 1949. The defendant appealed against that order, the appeal being heard on Monday, December 20.

In the course of the argument, the question was raised whether, having regard to the provisions of section 21 of the Crown Proceedings Act, 1947,[2] the defendant was rightly sued by his official title as a Minister of the Crown.

Sir Reginald Manningham-Buller Q.C., A.-G. and *Nigel Warren* for the Secretary of State of the Home Department. This is an appeal to obtain the discharge of an ex parte injunction. The defendant's only course is to come direct to the Court of Appeal, since the Secretary of State proposes to submit the draft order to Her Majesty in Council tomorrow, Tuesday. It is submitted

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[2] Crown Proceedings Act, 1947, s. 21 (1): "In any civil proceedings by "or against the Crown, the court shall, subject to the provisions of this Act, "have power to make all such orders as it has power to make in proceedings "between subjects, and otherwise to give such appropriate relief as the case "may require:

"Provided that:—(*a*) where in any proceedings against the Crown any such "relief is sought as might in proceedings between subjects be granted by way "of injunction or specific performance, the court shall not grant an injunction "or make an order for specific performance, but may in lieu thereof make an "order declaratory of the rights of the parties. . . ."

Subs. (2): "The court shall not in any civil proceedings grant any injunc"tion or make any order against an officer of the Crown if the effect of granting "the injunction or making the order would be to give any relief against the "Crown which could not have been obtained in proceedings against the Crown."

C. A.
1954

HARPER
v.
HOME
SECRETARY.

that the court has, under the Supreme Court of Judicature (Consolidation) Act, 1875, s. 31 (1) (i) (ii), jurisdiction to hear an appeal from an ex parte injunction. [Reference was made to the Annual Practice, 1955 ed., p. 1235.]

Sir Andrew Clark Q.C., J. V. Nesbitt and *R. L. McEwen* for the plaintiffs. It is submitted that there is no jurisdiction to hear an appeal from an ex parte injunction. There is only a right of appeal from a refusal of a judge to hear an application to rescind an ex parte injunction. The only question is whether the ex parte injunction should be dissolved. The motion comes on for hearing tomorrow, Tuesday, and the status quo should be preserved until then. The plaintiffs, however, do not wish to press the point.

Sir Reginald Manningham-Buller. The judge had no jurisdiction to grant this injunction. The House of Commons (Redistribution of Seats) Act, 1949, provides by section 3 (4) that, where a draft order has been approved by resolution of both Houses of Parliament, the Secretary of State shall submit it to Her Majesty in Council. An injunction cannot be granted to restrain the Secretary of State from doing an act which, under the statute, he is under an obligation to do. This is not a case where the plaintiffs are being deprived of the franchise. They are merely being transferred to another parliamentary division. Further, there was no jurisdiction to make this order for the following reasons: First, the High Court has no jurisdiction to restrain a Secretary of State from laying a document before Her Majesty in the same way as the court has no jurisdiction to restrain a Minister tendering advice to Her Majesty. When a draft order has been approved by resolution of both Houses of Parliament, the position is the same as where a Bill has been passed by both Houses. In such a case there would be no jurisdiction to apply to the court to prevent the Bill being submitted for the royal assent. Secondly, the Crown Proceedings Act, 1947, does not empower the granting of an injunction of any kind. Thirdly, if the court has jurisdiction in a case such as this to grant an injunction, there is no ground for doing so in this case. The order of Roxburgh J. is based on the assumption that the report of the Boundary Commission contained an error, in that it departed from the principles laid down in the Act of 1949. It is submitted that the report contains no error. Even if it did, it would none the less be a report submitted under the Act, which the Secretary of State would be bound to submit to Parliament under section 2 (5). The plaintiffs cannot interfere with the procedure laid down in the Act after both Houses have passed resolutions approving a draft order.

Harman J. in *Hammersmith Corporation* v. *Boundary Commission for England* [3] rightly held that the court should not interfere with the proceedings of the Boundary Commission. The principles which guided the Boundary Commission in the conclusions which they reached appear on the face of the report. There is no ground for saying that it does not comply with the requirements of the Act. Even if there had been an error in the report, it would have been a matter for Parliament and not for the courts. It was held in *Reg.* v. *Lords Commissioners of the Treasury* [4] that mandamus would not lie where there was no duty to any individual. The Secretary of State owed no duty in this matter to any elector. The only function of the Secretary of State was to draft orders for the approval of Parliament. Before the passing of the Crown Proceedings Act, 1947, an action of this kind would not lie: *Hutton* v. *Secretary of State for War.*[5] Section 21 (1) of that Act prevents any injunction being granted in such a case as this. These proceedings are against an officer of the Crown to obtain relief against the Crown and are not maintainable having regard to section 21 (2) of the Act of 1947. [Reference was also made to *Underhill* v. *Minister of Food.*[6]]

Sir Andrew Clark Q.C. for the plaintiffs. This case has three aspects: (1) whether the court has jurisdiction; (2) whether there are errors in the report of such a fundamental nature that it is not in accordance with the requirements of the Act, and (3) whether the plaintiffs were entitled to apply for an injunction. As to jurisdiction, the plaintiffs rely on *Rex* v. *Electricity Commissioners* [7] on the question whether an injunction can be granted. The plaintiffs' cause of action is based on a breach of the statutory duty which the Secretary of State owes to them. He is not acting in this matter as the servant of the Crown. He is threatening to do something which he is not authorized to do by statute. It is immaterial whether he is sued personally or in his official capacity. *Attorney-General of New South Wales* v. *Trethowan* [8] shows that the plaintiffs are entitled to bring these proceedings. All that the Act of 1949 authorizes the Boundary Commission to do is to make recommendations as to the areas of the parliamentary constituencies in accordance with the rules in the Second

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[3] The Times, Dec. 15, 1954.

[4] (1872) L.R. 7 Q.B. 387.

[5] (1926) 43 T.L.R. 106.

[6] (1950) 66 T.L.R. (Pt. 1) 730; [1950] 1 All E.R. 591.

[7] [1924] 1 K.B. 171; 39 T.L.R. 715.

[8] [1932] A.C. 526.

Schedule of the Act. This report does not comply with these rules. They have not complied with rule 1 in their method of calculation. Rule 1 is mandatory. The method adopted for determining the electoral quota was wrong. The commission should have started on the basis of 519 constituencies for England. In founding their report on the basis of 506 seats they have departed from the Act.

EVERSHED M.R. This case comes before us in very unusual circumstances, and it is right that I should first make clear, as a matter of procedure, what it is that we are being called upon to determine. The writ in the action was issued last Friday, the plaintiffs being two individuals, a Mr. Harper and Mr. Lord, who are, at the moment, electors in one of the parliamentary divisions of Manchester. The defendant as described in the writ is the Secretary of State for the Home Department. The relief sought in the writ is, first, a declaration that the report of the Boundary Commissioners, dated November 10, 1954, and submitted to the defendant, that is, the Secretary of State, under the House of Commons (Redistribution of Seats) Act, 1949, was not made in accordance with that Act, and was therefore not a report as stated in that Act. The writ sought a further declaration that the Secretary of State was not bound to submit, and ought not to submit, to Her Majesty in Council a draft Order in Council as provided by the Act. It then seeks an injunction.

The plaintiffs moved Roxburgh J. on Friday morning for an ex parte injunction; and though the judge, apprehending the seriousness of the matter, gave an opportunity to enable the defendant to be before him in the afternoon, it was not in fact practicable, as may well be understood, for the defendant then to be represented by counsel. The judge accordingly dealt with the matter as an ex parte application. He made an order ex parte restraining the Secretary of State until after Tuesday (that is, tomorrow) or further order, from presenting to Her Majesty in Council a draft Order in Council as intimated in the indorsement to the writ.

In the ordinary course, the procedure would, I do not doubt, be that if the interval before the motion came on to be heard in the ordinary way were substantial, and if at the same time the defendant thought on any sufficient ground that the ex parte injunction ought not to be continued, he would apply to have it discharged. In this case the ex parte injunction only runs until tomorrow. It might therefore have been thought the more natural course to wait until tomorrow, in order that the judge might hear the motion inter partes, make a decision, and then, if either party were dissatisfied with that decision, there could be an appeal to this court. But, as everybody knows, and through no fault or malice on anybody's part, this matter has come before the court very late in the term, and the case being obviously one of substance and some urgency, to put it no higher, it has been thought proper, on behalf of the Secretary of State, to come to this court today to appeal against the making of the injunction ex parte.

We are therefore only concerned with the question whether that ex parte injunction was rightly granted. I think it right to emphasize these procedural matters, because the course which has been followed and which counsel have both thought it right to pursue here is one which owes its existence, owes the fact of its having been followed, to the special circumstances, particularly as to time, in which the court is now placed. I do not, however, forget that it is only with the ex parte injunction that the court is now concerned. Yet if we reach a conclusion that the ex parte injunction should not have been granted, on grounds which affect the declarations sought in the writ, it is obvious that, as a practical matter, our decision is likely to govern what will hereafter occur on the hearing of the motion tomorrow and of the action itself.

It is plain that the form of the action is an unusual one. The defendant is the Secretary of State for the Home Department, and, as is apparent from the indorsement, what the plaintiffs seek to achieve is an injunction to restrain the Secretary of State from presenting to Her Majesty in Council a draft order, which has already received the approval of both Houses of Parliament. It is therefore obvious that the court is concerned with matters which at any rate come somewhat near to touching on the relative spheres of Parliament and the courts.

The Act of 1949 was passed to replace an earlier Act and to consolidate earlier enactments. Its long title is "An Act to consolidate the enactments which make permanent provision for "the redistribution of seats at Parliamentary elections," etc. The first section established Boundary Commissions for the four parts of the United Kingdom of Great Britain and Northern Ireland, namely, England, Scotland, Wales and Northern Ireland. After stating how those commissions were to be constituted, section 2 provides: [His Lordship read section 2 (1) and (5) and section 3 (2) and (4) and continued:]

In the present case, the Secretary of State, having received the report, laid it before Parliament, together with a draft Order in Council, and each of the Houses of Parliament approved that Order in Council. Prima facie, therefore, the Secretary of State must now submit the draft Order in Council to Her Majesty. I have said that the case is, therefore, a striking one, coming near, at the least, to involving the privileges and powers of Parliament; but let me say at once that the courts have never been reluctant or afraid to exercise their powers where they are satisfied that such powers reside in the courts and that some one or more of the subjects of Her Majesty are in danger of finding their rights imperilled.

The Second Schedule to the Act contains the rules which are to be the guide of the Boundary Commission in making and presenting their reports. These rules are described as "Rules "for redistribution of seats." Rule 1 provides: "The number "of constituencies in the several parts of the United King"dom set out in the first column of the following table "shall be as stated respectively in the second column of "that table." The first column is headed: "Part of the United "Kingdom" and the second column "No. of Constituencies." Then against "Great Britain" one finds "not substantially "greater or less than 613." Then: "Scotland . . . Not less "than 71. Wales . . . Not less than 35, and Northern Ireland ". . . 12." It is convenient to pause in order to say that (Wales having risen to the figure of 36) the figure of 107 should be deducted from the figure of 613 opposite "Great Britain," so that, in considering the English representation, it may for practical purposes be said that the figure is not to be substantially greater nor less than 506. [His Lordship read rules 2, 5 and 6, and continued:]

Then, to complete my reading of the Schedule, the phrase, "electoral quota," used in rule 5, is defined to mean, so far as Great Britain is concerned, "a number obtained by dividing the "electorate for Great Britain by the number of constituencies "in Great Britain existing on the enumeration date." I need not take time to state what is meant by "enumeration date."

Before I proceed to consider what has been done, I venture to draw attention to one feature of these rules which seems to me to be striking; that is that, within certain broad lines, a measure of latitude or of discretion is plainly conferred. And it is primarily conferred, I think, on the commission. It would be difficult to think of any other way in which such a body would work. To take examples, the first rule provides for a figure "not substantially greater or less." Then in the fourth rule there is the phrase "So far as is practicable having regard "to the foregoing rules"; and in the fifth rule it is stated "The electorate of any constituency shall be as near the electoral "quota as is practicable having regard to the foregoing rules"; and "a Boundary Commission may depart from the strict "application of the last foregoing rule if it appears to them that "a departure is desirable to avoid an excessive disparity." Again in rule 6: "A Boundary Commission may depart from the strict "application" if it appears to them "desirable," and so forth.

It is, however, a fact that some primacy is obviously given to the first three rules; particularly, for example, Scotland's representation is to be "not less than 71"; and for Great Britain as a whole the number of constituencies is not to be substantially greater or less than 613. In rule 2 again "every constituency "shall" be a single member constituency.

I turn now to see how the commission in this case have gone about their task. The authority for the procedure adopted was stated in paragraph 8. They said that they were advised that it was unlikely that their opposite numbers, so to speak, the Boundary Commissions for Scotland and Wales, should want to add to Scottish and Welsh representation, and they "proceeded "on the basis that the number of constituencies available for "distribution in England was to be not substantially greater or "less than 506." It seems impossible to suggest that the Boundary Commission have so far done anything to which anybody could take the smallest exception.

They then added this sentence, which has brought upon them the criticism of acting outside their proper sphere. They said: "We allocated seats provisionally to administrative counties with "their associated county boroughs on the basis of one seat for "each complete unit of electors, the unit representing the average "electorate in England, namely, 57,122, determined by dividing "the total English electorate, viz., 28,904,108 by 506." They continued: "Our aim was to create 506 constituencies each of "which would be at or near the electoral quota without cutting "across local government boundaries." They said that in some cases that would be easy enough, and that in others it would require special consideration; and in those cases what they had to do was to decide between departure from quota or disregard of boundaries. After considering all those cases accordingly, their recommendation was that they would increase the number of constituencies in England from 506 to 511; but they showed that their final suggested rearrangement was such that in more than 80 per cent. of the whole they did achieve a range of figures of electorate which was close to the electoral quota, the electoral quota as defined by the Act being a total of 55,670.

The challenge to the validity of that report is that in the sentence read (supra) in paragraph 8 referring to a provisional allocation on the basis of a unit of single-member constituencies, every unit containing 57,122, there was a misdirection of themselves so fundamental as to disable all the later calculations. It is said that what they ought to have done was to work out and discover what the electoral quota was (as indeed they did), namely, 55,670, and if they had divided the total English electorate, 28,900,000 odd, by that figure, they would have found out that the arithmetical answer was 519. Sir Andrew suggests that 519 could not be said to be a substantial increase above 506. They should, therefore, have started on the basis that there were going to be 519 seats. By placing far too much emphasis on the originating figure of 506 constituencies, he says, they got the whole thing wrong and have produced a report which so far departs from the authority vested in them that he, Sir Andrew, can say it is not a report at all.

On this matter I have myself come to a clear conclusion that there is no ground for saying that this report, as I read it, was such a substantial departure, or was indeed any departure, from the rules which the commission had to have in mind. The commission plainly placed emphasis on rule 1, namely, that the number of English seats was to be not substantially greater or less than 613, minus the Scottish and Welsh; and on the rule that they were to be single-member constituencies. What they proceeded to do was to say that if every constituency was ideally such that there was one member for an equal number of electors, then there would be 506 constituencies of 57,000 odd each; but they also said that what they aimed to do was to create 506 constituencies having a number of electors as near as possible to the electoral quota, and, that being impossible, they had to decide, according to their discretion, whether the quota should give way to boundaries or vice versa. The whole method was exposed on the face of the report, and, if the method they adopted was one which Parliament itself did not like, it no doubt would have modified or rejected it.

I am, I am afraid, quite unable to accept, with all respect to him, the view which commended itself to Roxburgh J. He said:

"It is perfectly true that there is an overriding provision in "rule 1 that the allocation of seats to Great Britain, excluding "Northern Ireland, was not to be substantially greater or less "than 613, but I think that it would be difficult to say that 626" —and that, of course, is the same figure, with the Scottish and Welsh constituencies put in, as the 519 that I mentioned earlier— "was substantially greater or less than 613, and therefore it "would appear to me that the Boundary Commission ought to "have approached the problem in accordance with the rule along "those lines."

My reading of these rules and of the whole Act is that it was quite clearly intended that, in so far as the matter was not within the discretion of the commission, it was certainly to be a matter for Parliament to determine. I find it impossible to suppose that Parliament contemplated that, on any of these occasions when reports were presented, it would be competent for the court to determine and pronounce on whether a particular line which had commended itself to the commission was one which the court thought the best line or the right line—whether one thing rather than another was to be regarded as practicable, and so on. If it were competent for the courts to pass judgments of that kind on the reports, I am at a loss to see where the process would end and what the function of Parliament would then turn out to be.

If that is the right view, then, as I think, everything else follows. Sir Andrew indeed conceded that, unless it could be said that the report was vitiated by the commissioners' misdirection of themselves so as to be, in effect, no report at all, his cause of action was destroyed in limine. I find it unnecessary to say what the court would say or should do if the commission on the face of a report made recommendations which were manifestly in complete disregard of the Act of 1949 and of the rules thereunder. I find it difficult to think that Parliament would pass them by unnoticed; but, if Parliament none the less adopted them, I find it unnecessary to say what view the court might take.

In *Hammersmith Corporation* v. *Boundary Commission for England*,[1] arising out of the same report, which came before Harman J., the remedy sought by representatives of certain other constituencies was against the Boundary Commission itself, and not the Home Secretary. The judge there said: "This is not a matter in which I ought to be asked to interfere

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[1] The Times, Dec. 15, 1954.

"or in which any good purpose would be served by my seeking "to do so. I do not think questions of jurisdiction really need "be debated at this stage. I shall assume that I can, if neces"sary, express an opinion as to the proceedings of the Boundary "Commission, without going beyond the functions of this court, "but I am satisfied that I should certainly serve no useful object "by doing so, and that the machinery set up under this Act "does not leave any room which makes it appropriate for the "court to intervene either at this or at any other stage." I must say that I find myself in agreement with the view that obviously commended itself to Harman J.

Sir Andrew referred us to one or two cases, and on those I ought to say a few words. In *Rex* v. *Electricity Comsioners*,[2] the court granted a writ of prohibition against the Electricity Commissioners. But, in that case, what the Electricity Commissioners were told to do was to prepare certain schemes which would become orders on their confirmation, first by the Minister, and later by the resolution of the House. They would always be the orders of the commissioners, and the Act, which imposed on them the duty of making these schemes, plainly imposed on them quasi-judicial functions. In that case, it was discovered that, while they were proceeding, and before they had reached the stage of preparing and presenting an order, they had gone altogether outside the functions which were committed to them by Parliament. Atkin L.J. said[3]: "If the "above construction of the Act is correct the Electricity Commis"sioners are themselves exceeding the limits imposed upon them "by the Legislature, and so far from seeking to diminish the "authority of Parliament we are performing the ordinary duty "of the courts in upholding the enactments which it has passed."

Younger L.J. said[4]: "That Act in my judgment contem"plates that the commissioners' order, which, when approved by "a resolution passed by each House of Parliament, is to have "effect as if enacted in the Act, embodies only a scheme which "under the Act the commissioners are given power either to "approve or formulate. Every scheme under the Act remains "the scheme of the commissioners even after it is confirmed" and so forth. Both Younger L.J. and Atkin L.J. in an earlier passage[5] had observed that the commissioners were given limited quasi-judicial functions, and that it had been established that the commissioners had exceeded those functions. If the Boundary Commission had been given similar functions, and if it had become manifest at some stage or on any occasion that they were exceeding them, it might well be that the court would think it right to make a prerogative order of prohibition or mandamus to compel them to perform their functions properly. I observe that Atkin L.J. forbore from expressing any view as to what the court would do if Parliament had, in fact, approved the order which the commissioners had been restrained from proceeding to make.

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[2] [1924] 1 K.B. 171; 39 T.L.R. 715.

[3] [1924] 1 K.B. 171, 210.

[4] Ibid. 212.

[5] Ibid. 207 et seq.

The other case to which Sir Andrew referred was *Attorney-General of New South Wales* v. *Trethowan*,[6] in order to show that the court will in appropriate cases grant injunctions and grant them ex parte to prevent someone in the position of a Minister from taking a bill or order, or whatever it might be, to the Sovereign or the Sovereign's representative for the purpose of its becoming law. But that was a case where the legislature concerned, namely, the legislature of New South Wales, had under the Australian Constitution strictly limited legislative functions; and, it having been shown that the proposed Act of Parliament had disregarded the provision in the Constitution which required a particular sanction on the part of the electorate, the courts in Australia restrained members of the Legislative Council, other than the plaintiffs, who were suing, from proceeding to take the measure for the approval of the Governor-General; and the Privy Council here affirmed them. That seems to me to be quite a different case from the present. We are in no sense here concerned with a Parliament or legislature having limited legislative functions according to the constitution.

I do not, therefore, think that those two cases carry Sir Andrew any further on his road. The Attorney-General said that, apart from the question of the effect of the report and the proposed Order in Council, the courts had in any case no more power to grant the injunction against the Secretary of State than they would have to prevent a Minister, or the other appropriate persons concerned, from taking to the Sovereign a Bill that has duly passed its third reading in each of the two Houses for the royal assent; and a reference was made by him to *Reg.* v. *Lords Commissioners of the Treasury*.[7] I do not find it necessary to express any view on that broad proposition, save to say that, in my judgment, *Reg.* v. *Lords Commissioners of the Treasury* [7] seems to me to be of a wholly different character from that with which we are now concerned.

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[6] [1932] A.C. 526.

[7] (1872) L.R. 7 Q.B. 387.

But I return at the end of my judgment to the point which I mentioned earlier and on which I would say one final word, namely, the question of the defendant to this action. I have said that the defendant is "the Secretary of State for the Home "Department"—sued, that is to say, by his official title as a Minister of the Crown. It is said by Sir Andrew that, since the report disregarded the rules in the Act of 1949, therefore it is not a report within the meaning of the Act, and that the Secretary of State has neither the duty to the House or to anyone else, nor the power or authority, to take this proposed Order in Council to Her Majesty. I am not myself satisfied that Sir Andrew is not in this respect upon the horns of a dilemma. If the whole thing is a nullity and all he seeks to do is to restrain a particular individual, who happens at the moment to be the Secretary of State for the Home Department, I am not satisfied that he ought not to sue him in his personal capacity as for an ordinary wrong—though, in that case, it would not be clear to me what breach of duty to the plaintiffs he was engaged in committing. On the other hand, if he does sue him, and rightly sues him, in his capacity as Secretary of State for the Home Department, then I am not satisfied (though I express no final view on it, as we have not heard full argument) that the case is one which, having regard to the terms of the Crown Proceedings Act, 1947, will lie. And I am not satisfied, having regard to section 21 of that Act, that, on this alternative, the plaintiff could, in any event, obtain an injunction; but I find it unnecessary to do more than mention that caution on this point, for, in my judgment, the answer to this case is that the plaintiffs have not established a prima facie case to my satisfaction that the report, which was presented and which has formed the basis of all that subsequently happened, was otherwise than in accordance with the powers vested in the Boundary Commission; and more particularly that the resolutions which the Houses of Parliament passed and under which the Secretary of State has acted and is purporting to act contained in them, so to speak, any infection of invalidity. Therefore, I think that this ex parte injunction ought not to have been granted and I would allow the appeal against it.

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[7] (1872) L.R. 7 Q.B. 387.

JENKINS L.J. I agree and find nothing that I can usefully add to the reasons given for holding that this appeal should be allowed.

HODSON L.J. I also agree.

Appeal allowed.

Solicitors: *Treasury Solicitor; Sharpe, Pritchard & Co. for Philip B. Dingle, C.B.E., Town Clerk, Manchester.*

B. A. B.

1955
Feb. 25.

Danckwerts J.

In re HUTCHINSON, DECD.
HOLT *v.* HUTCHINSON AND OTHERS.

[1954 H. No. 3083.]

Administration of Estates—Personal chattels—Racehorses—Used for recreational purposes—Administration of Estates Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 23), *ss.* 46, 55 (1) (x).

By section 46 of the Administration of Estates Act, 1925, the widow of an intestate takes his personal chattels absolutely; "personal chattels" in the definition in section 55 (1) (x) of the Act include "carriages, horses, stable furniture and effects (not used "for business purposes) . . ."

W. V. H., who died intestate, owned at the date of his death 12 racehorses in training which were used purely for recreational purposes. On a summons taken out by one of the administrators of his estate to have determined whether the racehorses were "personal "chattels" within the meaning of section 55 (1) (x) of the Administration of Estates Act, 1925, and passed to his widow absolutely under section 46 of the Act:—

Held, that the conjunction of the word "horses" in the subsection with the words "carriages" and "stable furniture" did not restrict its meaning to horses used for domestic purposes, the racehorses, therefore, passed to the widow as "personal chattels" within the meaning of section 55 (1) (x).

ADJOURNED SUMMONS.

Walter Victor Hutchinson died intestate on April 30, 1950; letters of administration of his estate were taken out by the plaintiff and the first defendant, his widow, on July 5, 1950.

The plaintiff took out this summons to have determined whether 12 racehorses owned by the deceased at the date of his death, and kept in training for racing purposes, passed to his widow absolutely as "personal chattels" within the meaning of section 55 (1) (x) of the Administration of Estates Act, 1925.[1]

Eleven of the racehorses were sold after the death of the deceased for a sum of £5,717 5s. in the aggregate. The remaining horse broke a leg after the death of the deceased and was destroyed, but the administrators received £1,500 in respect of that horse under policies of insurance.

The 12 racehorses were at the date of the death of the intestate in stables known as Hazeley Down Stables, near Winchester, in the County of Southampton, and were being trained on behalf of the deceased by a private trainer to race under Jockey Club Rules on the flat. In addition to that activity, the deceased owned a stud farm which was run as a distinct and separate business by the deceased. He trained horses there and sold them to purchasers other than himself, and the stud farm was not run merely for the purpose of providing the deceased with racehorses.

G. F. Dearbergh for the plaintiff, one of the administrators.

T. A. C. Burgess for the first defendant, the widow. The racehorses are personal chattels within the meaning of section 55 (1) (x) of the Administration of Estates Act, 1925. There are three reported cases in which that subsection has been construed. In *In re Ogilby*[2] it was held that shorthorn cattle on a farm belonging to the intestate were not personal chattels, but in that case Simonds J. held that although the farm was not worked for a profit, in that the intestate made a loss on it, it was nevertheless a business and the herd of cattle was used for the purpose of that business. The racehorses in this case were used only for recreational purposes. In *In re Whitby*[3] the Court of Appeal

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[1] Administration of Estates Act, 1925, s. 46 (1): "(i) If the intestate "leaves a husband or wife . . . the "surviving husband or wife shall "take the personal chattels abso-"lutely . . ." S. 55 (1) (x): "'Per-"'sonal chattels' mean carriages, "horses, stable furniture and effects "(not used for business purposes), "motor cars and accessories (not used "for business purposes), garden "effects, domestic animals, plate, "plated articles, linen, china, glass, "books, pictures, prints, furniture, "jewellery, articles of household or "personal use or ornament, musical "and scientific instruments and "apparatus, wines, liquors and con-"sumable stores, but do not include "any chattels used at the death of "the intestate for business purposes "nor money or securities for money:"

[2] [1942] Ch. 288; 58 T.L.R. 209; [1942] 1 All E.R. 524.

[3] [1944] Ch. 210; 60 T.L.R. 224; [1944] 1 All E.R. 299.

1955

HUTCHINSON, DECD., *In re.* HOLT *v.* HUTCHINSON.

held that cut but unmounted diamonds were " jewellery " within the meaning of the subsection. That case shows that the court has not restricted the construction of the words in the subsection, and that they extend to anything that is normally meant by those words. In *In re Chaplin*[4] a motor yacht was held to be an article of " personal use." The court has not given effect to the word " personal " in the subsection so as to mean the deceased's property as used only by himself. Personal chattels are defined by Coke on Littleton (118b) to include " horses ": see Stroud's Judicial Dictionary, 3rd ed., p. 462. The word " horses " in the subsection must include every type of horse.

Maurice Berkeley for the second and third defendants, the children of the deceased. The racehorses are not horses within the meaning of the subsection, because one must regard the word " horses " in collocation with the words " carriages " and " stable " furniture and effects " not used for business purposes; that group is cut off from the rest of the articles enumerated in the subsection as personal chattels. The kind of horses envisaged in the subsection are those used for the household. In both *In re White*[5] and *In re Hall*[6] a motor-car was held not to pass under a bequest of carriages. In *In re Hall*[6] Parker J. said that having regard to the collocation of the word carriages with the words horses and harness, it appeared that the testator meant only such carriages as were used with horses. *In re Whitby*[7] is distinguishable because jewellery does not appear in any collocation with similar articles, and there is nothing to restrict its meaning. In *In re Chaplin*[8] a motor yacht was held to be an article of personal use, but that was something used in connexion with the family. These racehorses (with the exception of one horse which was ridden occasionally by the deceased) were not ridden by the deceased or his family. They were kept only for the purpose of racing; that was a business purpose. Horse-racing may not be a business from the point of view of the Income Tax Acts (see *Sharkey* v. *Wernher*[9]), but that does not mean that horse-racing is not a business for the purpose of section 55 (1) (x) of the Administration of Estates Act, which is concerned with personal chattels of domestic use, that should not include racehorses which are used only for the business of horse-racing. " Personal

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[4] [1950] Ch. 507; 66 T.L.R. (Pt. 1) 1166; [1950] 2 All E.R. 155.

[5] [1916] 1 Ch. 172.

[6] [1912] W.N. 175; 28 T.L.R. 480.

[7] [1944] Ch. 210.

[8] [1950] Ch. 507.

[9] [1954] Ch. 713; [1954] 3 W.L.R. 367; [1954] 2 All E.R. 753.

1955

HUTCHINSON, DECD., *In re.* HOLT *v.* HUTCHINSON.

"chattels" mean chattels which have some connexion with the deceased.

DANCKWERTS J. The question which I have to decide concerns 12 racehorses which belonged to the deceased at the date of his death. [His Lordship stated the facts, and continued:] It seems plain that the deceased's racing activities were not connected in any way with the stud farm business except that some of his racehorses may have been obtained from time to time from his stud farm. Separate accounts were kept of the stud farm business, and income tax was paid on the profits arising therefrom. It is plain, therefore, that the stud farm was a business, and that any horses on the stud farm were business assets of the deceased and were so treated. It is clear from the evidence that the racehorses were in an entirely different category. One of them appears to have been ridden sometimes by the deceased, but otherwise the deceased did not ride any of the racehorses, but merely used them for recreation, that is to say, in racing them.

In those circumstances, it was contended on behalf of the widow that these horses fall within the definition of "personal "chattels" in section 55 (1) (x) of the Administration of Estates Act, 1925, and in consequence passed to her absolutely and did not fall into residue.

I have been referred to a number of cases: *In re Whitby*,[1] *In re Hall*,[2] *In re White*,[3] and *In re Ogilby*.[4] That last case is perhaps of some interest as it was concerned with a farm which was carried on by the intestate; but none of these cases is directly concerned with the question of horses in this particular position.

Mr. Burgess relied upon *In re Whitby*,[5] which concerned cut but unmounted jewels, as indicating that limitations should not be unduly placed on the words in this subsection. On the other hand, Mr. Berkeley relied on *In re Hall*[6] and *In re White*,[7] as showing that some restrictive meaning may be placed on words, which otherwise have a comparatively plain meaning, by reason of their juxtaposition to other words such as "carriages . . . stable

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[1] [1944] Ch. 210; 60 T.L.R. 224; [1944] 1 All E.R. 299.

[2] [1912] W.N. 175; 28 T.L.R. 480.

[3] [1916] 1 Ch. 172.

[4] [1942] Ch. 288; 58 T.L.R. 209; [1942] 1 All E.R. 524.

[5] [1944] Ch. 210.

[6] [1912] W.N. 175.

[7] [1916] 1 Ch. 172.

1955

HUTCHINSON, DECD., *In re.* HOLT *v.* HUTCHINSON.

Danckwerts J.

" furniture and effects." *In re Hall* [8] and *In re White* [9] were not decisions on this subsection, but were decisions on terms contained in wills relating to a gift in each case of carriages, and were cases decided in days when motor-cars (which had been exchanged for the carriages) were comparatively uncommon. In those cases a meaning of a restrictive nature was given to the word " carriages " so as to exclude a motor-car.

I do not find that any of those cases gives me much assistance. I have to consider the words of the definition in subsection (1) (x) as they are. It is obvious that racehorses are horses, and prima facie it is plain, therefore, that they must be treated as within the definition, unless I find some kind of restriction from certain words in juxtaposition to the word " horses " in the subsection.

It has been argued by Mr. Berkeley that the word " horses," being used in the subsection in conjunction with the words " carriages," " stable furniture and effects," must be confined to horses used for the domestic purposes of the premises on which the deceased resided. On the whole, I see no reason why I should so restrict the perfectly plain meaning of the words. It is clear, and it is expressly stated in the subsection, that horses used for business purposes were not to be included, but I do not see why horses kept by the deceased purely for the purpose of recreation should not be included in the term " personal chattels " as defined in the subsection, and I hold accordingly that they pass under section 46 which gives the personal chattels to the widow.

I will declare that the " 12 racehorses belonging to the " deceased at the date of his death located at Hazeley Down " Stables, and which were at that date being kept in training " for racing purposes, were personal chattels of the deceased as " defined by section 55 (1) (x) of the Administration of Estates " Act, 1925."

Declaration accordingly.

Solicitors: *Birkbeck, Julius, Coburn & Broad; Wm. Easton & Sons.*

I. G. R. M.

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[8] [1912] W.N. 175.

[9] [1916] 1 Ch. 172.

1954
May 7, 18,
19, 28.

Roxburgh J.

C. A.

1954
Dec. 1, 21.

Jenkins and
Hodson L.JJ.
and Vaisey J.

In re HARRISON'S SHARE UNDER A SETTLEMENT.
HARRISON *v.* HARRISON.

[1954 H. 635.]

In re WILLIAMS' WILL TRUSTS.
WILLIAMS *v.* RICHARDSON.

[1953 W. 3683.]

In re ROPNER'S SETTLEMENT TRUSTS.
ROPNER *v.* ROPNER.

[1954 H. 204.]

Practice and Procedure—Order—Recall—Chancery Division—Jurisdiction—Jurisdiction of judge to recall order pronounced but not entered—Whether only exercisable on application by party to suit.

Applications were made for approval by the court on behalf of infant, unborn and unascertained persons of schemes affecting family trusts. On March 15 and 17, 1954, a judge in chambers, applying decisions of the Court of Appeal, pronounced orders approving the schemes. On March 25, 1954, the House of Lords gave its decision in *Chapman* v. *Chapman* [1954] A.C. 429; [1954] 1 All E.R. 798, which made it clear that the judge had no jurisdiction to make the orders.

At that date none of the orders in question had been entered, and the judge directed the registrars concerned not to proceed further with them, as he desired to hear further argument. The matter was adjourned into court, and all parties to the applications contended that the judge had no power to, or alternatively ought not to, recall the orders which he had pronounced. The judge varied the orders originally pronounced. On appeal by the plaintiffs:—

Held, that an order pronounced by a judge, whether in open court or in chambers, can always be withdrawn, altered or modified by him, either on his own initiative or on the application of a party, until such time as the order has been drawn up, passed and entered. The oral order is meanwhile provisionally effective, and can be treated as a subsisting order where the justice of the case requires it and the right of withdrawal would not thereby be prevented or prejudiced.

Where a judge has orally pronounced an order which is correct according to the authorities as they stand at the time, but before the order has been perfected it is authoritatively declared that the order made was outside his jurisdiction, it is right that the judge should withdraw the oral order originally pronounced by him.

When a judge has pronounced judgment, he retains control over the case until the order giving effect to his judgment is formally completed; such control, however, must be used in accordance with his discretion, exercised judicially and not capriciously.

Ex parte Hookey, In re Risca Coal and Iron Co. (1862) 4 De G. F. & J. 456 explained and not followed.

Decision of Roxburgh J. affirmed.

THREE APPLICATIONS heard together.

The following statement of the facts is taken from the judgment of the Court of Appeal:

In each of these cases an application by originating summons for sanction on behalf of infant, unborn and unascertained persons of a scheme making variations in the trusts of a settlement (or, in the second case, a will) came before Roxburgh J. in chambers on March 1, 1954. According to the decisions of the Court of Appeal in *In re Downshire Settled Estates* [1] and *In re Blackwell's Settlement Trusts*,[1] the variations sought were such as the court would have jurisdiction to sanction if satisfied that they were for the benefit of the infant, unborn and unascertained persons interested or potentially interested under the trusts.

There was then pending before the House of Lords the decision in *Chapman* v. *Chapman*,[2] and it appeared to Roxburgh J. that the decision in that case might impair or destroy the authority of the *Downshire* and *Blackwell* [3] cases. He accordingly adjourned the summonses with a view to dealing with them after, and in the light of the expected decision in *Chapman* v. *Chapman*.[4] On the following day, however, Roxburgh J. saw a report of *In re Yates' Settlement Trusts* [5] in which the Court of Appeal had held (though in somewhat special circumstances) that a similar application should not have been adjourned, as Harman J. had adjourned it, pending the decision of the House of Lords in *Chapman* v. *Chapman*,[6] but should have been heard and determined in the ordinary course.

Roxburgh J. regarded the decision in *In re Yates' Settlement Trusts* [7] as applicable to the summonses then before him. He accordingly caused them to be restored to his list and sanctioned the schemes by orders orally pronounced in chambers on March 15 and 17 respectively. On the assumption that the *Downshire* and *Blackwell* [8] cases were authoritative those orders were, at the dates on which he pronounced them, orders which he could properly make.

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[1] [1953] Ch. 218; [1953] 1 All E.R. 103.

[2] [1954] A.C. 429; [1954] 1 All E.R. 798.

[3] [1953] Ch. 218.

[4] [1954] A.C. 429.

[5] [1954] 1 W.L.R. 564; [1954] 1 All E.R. 619.

[6] [1954] A.C. 429.

[7] [1954] 1 W.L.R. 564.

[8] [1953] Ch. 218.

On March 25, 1954, the House of Lords pronounced their decision in *Chapman* v. *Chapman.*[9] The effect of that decision was to destroy the authority of the *Downshire* and *Blackwell*[10] cases and to make it clear that the court's jurisdiction over trusts did not extend to the sanctioning of variations in trusts such as those which Roxburgh J. had orally sanctioned on March 15 and 17, 1954. At the date of the House of Lords decision those orders had not yet been entered, or, in other words, had not been perfected as formal acts of the court. In those circumstances Roxburgh J. directed the registrar not to proceed further with the perfecting of the orders, and caused the summonses to be restored to his list and adjourned into court for further argument.

Raymond Jennings Q.C. and *L. M. Jopling* for the plaintiff in the first application. An order giving effect to the scheme is one which, it is admitted, can not now be made, having regard to the decision of the House of Lords in *Chapman* v. *Chapman.*[11] A judgment cannot be recalled after it has been pronounced, except (1) to correct, under the "slip rule," some error in the form of order which does not accurately express the true intention of the judge; (2) where both parties consent to some alteration or where no record exists of what the actual order was. A power to alter a judgment before it is passed and entered should be limited to the kind of case in which it has in fact been exercised. It never has been argued whether this power exists except in one case in the Court of Appeal.

[ROXBURGH J. I came to the conclusion that it was my duty to act as the Court of Appeal directed Harman J. to act in *In re Yates' Settlement Trusts,*[12] and to hear these applications.]

There is no reported case where an order has been recalled because of the decision of another court. It is submitted that *In re Yates' Settlement Trusts*[12] was rightly decided. If the power is at large, it ought not to be exercised in the present case. If this jurisdiction exists, then in cases concerning the appointment of receivers or liquidators orders might be liable to be recalled, and it would not be right for their rights to be fettered by that possibility. Parties are entitled to assume that they can act upon a judgment as soon as it is pronounced. That is clearly what Lord Westbury L.C. had in mind in *Ex parte Hookey.*[13]

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[9] [1954] A.C. 429.

[10] [1953] Ch. 218.

[11] [1954] A.C. 429.

[12] [1954] 1 W.L.R. 564; [1954] 1 All E.R. 619.

[Roxburgh J. The highest court has, in effect, stated that I have been acting in excess of my jurisdiction. I should have thought that it was my bounden duty to cure what I have done. Is there any rule which states that I cannot take administrative action to cure what I did wrongly?]

It is submitted that the court should not do so. In *In re Yates' Settlement Trusts,*[14] and two other cases, the orders, which were similar to those in the present applications, were drawn up before judgment was delivered in the House of Lords in *Chapman* v. *Chapman.*[15] It would be undesirable that the rights of the parties should depend on the administrative action of the court. It cannot be right that the way in which the clerical work of the court is organized should prejudice the parties. The date of the order is of paramount importance. Orders made in chambers are always dated on the day on which they are made—that is not in accordance with R.S.C., Ord. 41, r. 4, but it has been the practice for many years. [Reference was also made to section 62 of the Supreme Court of Judicature (Consolidation) Act, 1925 (which deals with the discharge of orders made in chambers) and to the Judicature Acts of 1873 and 1875.]

In *In re St. Nazaire Co.*[16] it was held that under the system of procedure established by the Judicature Acts no judge of the High Court had any jurisdiction to rehear an order, whether made by himself or by any other judge, the power to rehear being part of the appellate jurisdiction which was transferred by the Acts to the Court of Appeal. Lord Westbury L.C. pointed out the difficulties which would arise if judgments were not final: see his observations in *Ex parte Hookey, In re Risca Coal and Iron Co.*[17] to the effect that a court order should be dated with the date on which it was pronounced, whatever length of time might have elapsed between the date of its drawing up and that of its pronouncement. The case of *In re Australian Direct Steam Navigation* (*Miller's* case)[18] was reheard, and Captain Miller's name, which at the original hearing had been placed on the list of contributories, in the winding up of the company, was removed from the list on the rehearing, the attention of the court not having been called at the original hearing to a relevant article of association. But it does not appear from the report whether or not argument was directed to the question of the court's power to rehear the case.

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[13] (1862) 4 De G.F. & J. 456, 458–9.

[14] [1954] 1 W.L.R. 564.

[15] [1954] 2 W.L.R. 723.

[16] (1879) 12 Ch.D. 88.

[17] (1862) 10 W.R. 701, 702.

[18] (1876) 3 Ch.D. 661.

The modern practice has grown up from the decision in *In re St. Nazaire Co.*[19] In *In re Roberts* [20] Kay J. said that "where an "order had not been drawn up, whether it were an order made in "chambers or in court, the judge had a right, if something was "brought to his attention which he had not sufficiently considered, "to stay the drawing up of the order and rehear the matter before "making the final order." But in *In re Adam Eyton Ld.*[21] it was questioned whether a judge in chambers could rehear an order which he had previously made in chambers, but which had not been drawn up. In *In re Suffield and Watts* [22] Fry L.J. said: "*In re St. Nazaire Co.*[23] shews that when an order or judgment "of the High Court has once been perfected, the court has no "jurisdiction to alter it. So long as the order has not been "perfected the judge has a power of reconsidering the matter, "but, when once the order has been completed, the jurisdiction "of the judge over it has come to an end. . . ." *Preston Banking Co.* v. *William Allsup & Sons* [24] contains observations to the same effect.

The cases which have been referred to contain dicta to the effect that the court has jurisdiction to review a decision before the order has been drawn up. In most of those cases, however, the actual question was whether, after the order had been drawn up, the court still had seizin of the matter, and it was held that it had not. In *In re Thomas*,[25] in the course of an administration action, a master in chambers had confirmed a conditional contract for the sale of real estate, but the order had not been drawn up, and it was held that in those circumstances the summons could be adjourned and heard by the judge. [Reference was also made to *Millensted* v. *Grosvenor House (Park Lane) Ld.*[26]]

There appears to be no case in which the judge has reconsidered a decision otherwise than on the motion of the parties. In *In re Giles* [27] it was held that a motion to review a final order made in chambers must be brought within 21 days. [Reference was made to sections 61 and 62 of the Judicature Act, 1925, and to section 3 of the Judicature Act, 1873.]

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[19] 12 Ch.D. 88.

[20] [1887] W.N. 231.

[21] (1887) 36 Ch.D. 299, 301.

[22] (1888) 20 Q.B.D. 693, 697.

[23] 12 Ch.D. 88.

[24] [1895] 1 Ch. 141, 144–5.

[25] [1911] 2 Ch. 389.

[26] [1937] 1 K.B. 717.

[27] (1890) 43 Ch.D. 391.

Before the Act of 1873 the jurisdiction of a judge in chambers depended on the "Act to abolish the office of Master in Ordinary "of the High Court of Chancery," 1852 (15 & 16 Vict. c. 80), ss. 11, 13 and 26. Before the Act of 1852 the judges of the Court of Chancery never sat in chambers. They sat in camera. Section 50 of the Act of 1873 provides that orders made in chambers can be set aside or discharged by the judge sitting in court. We have been unable to discover why that jurisdiction was given. The practice of adjourning an order from chambers into court and moving to discharge it after it has been drawn up is based, not on the view that an order made in chambers is less efficacious than one made in court, but on the view that it is inconvenient to go from chambers direct to the Court of Appeal. A judge sitting in chambers is not exercising a jurisdiction of a kind different from that exercised in court.

As a matter of general principle the maxim actus curiae neminem gravabit applies, that is, acts of the court never operate to the prejudice of the parties; for example, entering judgment nunc pro tunc when one of the parties dies after judgment has been reserved. The principle is that the parties are not to be prejudiced by acts of the court over which they have no control.

In Harrison's Chancery Practice (1808), vol. 1, p. 324, it is stated that a decree is binding from the time of its pronouncement. That statement is cited in Seton, 2nd ed. (1854), at pp. 583–4, where the author is dealing with passing, entering and modifying decrees: "A decree is binding from the time it is pronounced, "and the subsequent proceedings in drawing up are ministerial only." It is submitted that a line is to be drawn between passing and entering.

[Reference was made to the fact that the court cannot of its own motion call a witness if the parties object. Annual Practice (1953), p. 638, n. *In re Enoch and Zaretzky, Bock & Co.'s Arbitration.*[28]] As to "Effect of Non-entry of Order," see Annual Practice (1953), p. 710, n.

Jopling following, referred to R.S.C., Ord. 16, r. 11, with regard to what the court may do without the application of a party. Order 33, r. 2, enables the judge at any stage of a cause or matter to direct any necessary inquiries or accounts, and to interfere (r. 9) in case of delay. This is one of the few administrative powers of the court. Order 40 is concerned with motion for judgment; Order 41 with entry of judgment. [Reference was also made to Ord. 55, rr. 73 and 74.]

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[28] [1910] 1 K.B. 327.

1954

HARRISON'S SHARE UNDER A SETTLEMENT, *In re.* WILLIAMS' WILL TRUSTS, *In re.* ROPNER'S SETTLEMENT TRUSTS, *In re.*

In the present case the court has done justice on the facts before it; it would be extraordinary if, by reason of the decision in another case, subsequently reported, the court could alter its judgment. The result of exercising such a power would lead to consequences which themselves would constitute a reason for submitting that the judges have not that power. The authorities on the matter contain no more than dicta. They all proceed from *Miller's* case [29] and *In re St. Nazaire Co.*[30] The dictum in *Miller's* case [31] was no more than a remark interjected in the course of the argument. There exists no authority for the proposition that a judge has power to intervene in the drawing up of his own order, or that an order can be affected by something which happened after it was pronounced.

F. G. King, for a defendant interested in upholding the scheme, referred to *Attorney-General* v. *Lewellyn.*[32]

J. M. Price, for a defendant interest in upholding the scheme, adopted the arguments on behalf of the plaintiff.

T. A. C. Burgess, for the plaintiff in the second application, and *E. M. Winterbotham*, *R. S. Lazarus*, *D. A. Ziegler*, and *T. K. Wigan* for various defendants in that application adopted the arguments of the plaintiff in the first application.

D. A. Ziegler for the plaintiff in the third application, and *B. S. Tatham* and *J. G. Monroe* for various defendants in that application also adopted the argument of the plaintiff in the first application.

Cur. adv. vult.

May 28, 1954. ROXBURGH J. I have before me three applications for the approval by the court on behalf of infant, unborn and unascertained persons of three schemes affecting family trusts. They are schemes which admittedly could not be sanctioned if they were now brought before the court for the first time in the face of the decision of the House of Lords in *Chapman* v. *Chapman.*[1] When these applications were ripe for hearing the argument in that case had been completed, but no decision had been given. I accordingly postponed consideration of them, believing that their Lordships might make observations upon the cognate cases of *In re Downshire Settled Estates* and *In re Blackwell's Settlement Trusts.*[2] But when I read in The Times on March 2, 1954, a report of the decision of the Court of Appeal in *In re Yates' Settlement Trusts* [3] I thought that I ought to do what the Court of Appeal directed Harman J. to do. Accordingly I heard these three summonses in chambers, and pronounced orders approving the three schemes in one case on March 15, 1954, and in the other two cases on March 17, 1954. When the decision of the House of Lords [in *Chapman* v. *Chapman* [4]] was made known on March 25, 1954, none of these orders had been entered, and acting under section 110 of the Supreme Court of Judicature (Consolidation) Act, 1925, I directed the registrars concerned not to proceed further with them, as I desired to hear further argument and to inform the parties accordingly. As a result the parties are before me again at my invitation and on my initiative, and they have with one accord contended before me that I cannot, or, alternatively, ought not to, recall the orders which I pronounced, and hear further argument, but must or should allow them to be entered and thus perfected.

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[29] 3 Ch.D. 661.
[30] 12 Ch.D. 88.
[31] 3 Ch.D. 661.
[32] (1888) 58 L.T. 367.

[1] [1954] 2 W.L.R. 723; [1954] 1 All E.R. 798.
[2] [1953] Ch. 218; [1953] 1 All E.R. 103.

Mr. Jennings' able argument fell into three parts: (1) that no order pronounced in the circumstances of the present case could be recalled; (2) alternatively, that no such order could be recalled on the initiative of the judge himself; (3) alternatively, that in the present cases the orders ought not to be recalled.

Before I embark upon these interesting submissions, I must clear away one point which counsel have successfully disposed of. These orders were made in chambers, and there are well-recognized differences between such orders and orders made in open court. When the jurisdiction of the Master of the Rolls and the Vice-Chancellors in chambers was created by section 11 of the Act to abolish the office of Master in Ordinary of the High Court of Chancery (15 & 16 Vict. c. 80), it was provided (section 15) that their orders made at chambers should have the force and effect of orders of the Court of Chancery. But at that time the Court of Chancery had appellate jurisdiction. When that appellate jurisdiction was for the most part transferred to the Court of Appeal by section 18 of the Supreme Court of Judicature Act, 1873, it was expressly provided by section 50 that every order made by a judge of the High Court in chambers (with certain exceptions) might be set aside or discharged upon notice by any Divisional Court or by the judge sitting in court, according to the course and practice of the Division of the High Court to which the particular cause or matter in which such order was made might be assigned. The substance of that provision is now to be found in section 62 of the Supreme Court of Judicature (Consolidation) Act, 1925. Accordingly it comes about that this fragment of appellate jurisdiction to discharge an order made in chambers, even after it has been perfected, still adheres to the Chancery Division. But I have been convinced that an appellate jurisdiction is never exercised on the initiative of the appellate tribunal itself. The question is really whether the judge who has tried a case retains sufficient control over it, until the order has been perfected by entry, to enable him to recall the order which he has pronounced and to require further argument.

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[3] [1954] 1 W.L.R. 564; [1954] 1 All E.R. 619.

[4] [1954] 2 W.L.R. 723.

That a judge can do this on the initiative of a party must, I think, be treated as settled. I will refer to cases in which this has been done, and to many dicta justifying it. It is true, as Mr. Jennings pointed out, that Lord Westbury L.C., in discussing the date from which an order takes effect, used strong words which might well have been used to justify the proposition that no order can be varied by the judge who pronounced it, even though not passed and entered. In *Ex parte Hookey* [5] Lord Westbury L.C. said: "An order of the Court of Chancery, however long a time "may elapse in the ministerial duty of drawing up that order and "committing it to paper, is made to bear date on the day when "it is pronounced by the court. That date appears in the document in which the order is recorded, and the principle, therefore, "involves of necessity this consequence, that the order must be "accepted for all purposes as having been made on the day on "which it is dated. . . . The principle which makes the order, "whenever drawn up and entered, to bear date on the day when "it is pronounced by the court, I hold to be one in perfect conformity with the whole theory of judicial procedure. The theory "of judicial procedure is that the cogent and binding effect of "the order begins immediately from the time when the order is "pronounced by the lips of the judge, and if that could be done "physically which legally is supposed to be done, and which one "would desire to be done if it were possible, every order would "be completed on the spot, written out by the judicial officer "and *in curia* before the court rises, and delivered to the parties. "That is the unquestionable theory of judicial procedure, and in "conformity with that theory that is the time when the order is "'made,' for the two words must be considered as equivalent "and capable of being substituted the one for the other. The "mere defining of the words of the court by writing and reducing

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[5] (1862) 4 De G.F. & J. 456, 458-9.

"them into a form in which they can be evidence is a ministerial "operation which, according to the true theory, succeeds the "delivery of the order by the judge, and must be in point of fact "nothing in the world more than the physical embodiment on "the spot by the court of the words which the judge has used."

But these weighty reflections have, I think, been outweighed by the manifest disadvantage of a rule which would prevent a judge from correcting a mistake which he had made when pronouncing an order though the mistake had been discovered before the order was perfected. At best, such a rule would involve the parties in the expense of an appeal. At its worst, when unborn or unascertained persons were adversely affected, or when the mistake was known only to the judge himself, it would involve a miscarriage of justice.

At any rate, judges have recalled such orders in cases reported and unreported. One of the earliest is *In re Australian Direct Steam Navigation (Miller's Case)*.[6] On July 1, 1876, Sir George Jessel M.R. pronounced judgment to the effect that Captain Miller's name be placed on the list of contributories in the winding up of the Australian Direct Steam Navigation Co. Ld. Before the order was drawn up the case was "reheard in consequence "of the attention of the court not having been called"[7] to a relevant article of association, and on July 31, 1876, Captain Miller's name was ordered to be removed from the list. Truly, as Mr. Jennings says, the report does not fully disclose the circumstances in which the case was reheard, and there may have been special circumstances, but the fact remains that Sir George, in referring to this case in *In re St. Nazaire Co.*,[8] said: "In "*Miller's* case no order had been drawn up. A judge can always "reconsider his decision until the order has been drawn up." From this I infer that he did not consider that there were any special circumstances, or that any special circumstances were required, or that the power of rehearing (until the order was perfected) was subject to any limitation whatever. A dictum no doubt, but one of weight and venerable antiquity. Next comes what I think may fairly be called a clear decision on the point. This is *In re Roberts*.[9] When an interpleader summons was heard in chambers, the judge barred the claimant under an erroneous impression as to the facts of the case. No order had been drawn up. There was a motion to discharge the order, but this procedure was barred by section 17 of the Common Law Procedure Act, 1860. After stating this in effect, Kay J. went on to say that where an order had not been drawn up, whether it were an order made in chambers or in court, the judge had a right, if something was brought to his attention which he had not sufficiently considered, to stay the drawing up of the order and rehear the matter before making a final order. He should therefore treat the matter as if the summons were adjourned into court, and now make an order in favour of the claimant.

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[6] (1876) 3 Ch.D. 661.

[7] Ibid. 667.

[8] (1879) 12 Ch.D. 88, 91.

[9] [1887] W.N. 231.

Again I note the generality of this statement.

In the next case which was cited to me, *In re Adam Eyton Ld.*,[10] one Banner was on May 19, 1887, appointed liquidator in chambers. Before that order had been drawn up a creditor applied to the judge in chambers to substitute one Chalmers as liquidator in the place of Banner, and an order was made accordingly on June 20, 1887. In the Court of Appeal the order of May 19, 1887, was treated as having been effective, though not drawn up, and the order of June 20 was treated as an order removing Banner from office, and therefore the decision has no direct bearing on the present case. But during the argument counsel submitted that a judge could not discharge in chambers an order made in chambers. Thereupon Fry L.J. interposed [11]: "I have an impression that he can re-hear it before the order has "been drawn up," and Cotton L.J. said: "I am disposed to hold "that after an order has been pronounced, and nothing remains "but to draw it up, it cannot be re-heard." I am inclined to think that both the Lords Justices were referring to what could be done in chambers in contrast with court. But if their dicta were intended to be of wider application, they neutralize one another.

In *In re Suffield and Watts* [12] the order had been perfected; but in the course of his judgment Fry L.J. said: "So long as "the order has not been perfected the judge has a power of "re-considering the matter, but, when once the order has been "completed, the jurisdiction of the judge over it has come to an "end." This was a dictum, but a weighty dictum; and it is to be noted that the power of reconsidering the matter is not made to depend upon any appeal or application, but simply upon the circumstance that the jurisdiction of the judge which has been invoked by the parties to the suit does not pass away from him until the order has been perfected.

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[10] (1887) 36 Ch.D. 299.

[11] Ibid. 301.

[12] (1888) 20 Q.B.D. 693, 697 (C.A.).

Later cases in the Court of Appeal endorse this dictum. Thus in *Preston Banking Co.* v. *William Allsup & Sons* [13] A. L. Smith L.J. said: "Fry L.J. put the law on the right foundation when "he held, in *In re Suffield and Watts*,[14] that so long as the order "has not been perfected, the judge has a power of reviewing "the matter, but when once the order has been completed the "jurisdiction of the judge over it has come to an end"; and in *Millensted* v. *Grosvenor House (Park Lane) Ld.*,[15] Farwell J., sitting in the Court of Appeal, treated this matter as settled. In my judgment it has now been settled for a long time.

This being so, I pass to Mr. Jennings' second contention, which was that once an order has been pronounced the judge can only recall it upon the application of a party. He pointed out that there was no reported case in which a judge had acted on his own initiative. But I would reply that as there are few reported cases in which an unperfected order has been recalled (though the power to do this is well settled), and as the cases in which one of the parties would not apply if there was any ground for making an application would be rare, I find nothing strange in this. This power to recall an unperfected order is not appellate in its nature, but exists because the jurisdiction which the parties have invoked is still continuing. There is no suggestion in any of the dicta that an application is necessary to confer or prolong jurisdiction which would otherwise be at an end. Indeed, the contrary seems to me to be implicit in them. Moreover, there are some cases (such as the present) where persons may be affected who are not parties, and it would be strange if the parties could combine by a conspiracy of silence to prevent a judge from correcting a mistake which might operate to the disadvantage of other persons concerned. Moreover, I can think of cases in which the mistake might be known only to the judge himself. Must he then summon the parties before him and invite one of them to make an application to him, confessing that he cannot otherwise rectify his mistake?

It was argued that if the judge can act on his own initiative as well as on the application of a party, the area of uncertainty between the pronouncement and the perfecting of the order is thereby unduly enlarged. But the enlargement of the area is very small and is to be justified upon exactly the same grounds as is its creation.

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[13] [1895] 1 Ch. 141, 144–5.

[14] 20 Q.B.D. 693.

[15] [1937] 1 K.B. 717; 53 T.L.R. 406; [1937] 1 All E.R. 736.

Mr. Jopling argued that the absence from the Rules of the Supreme Court of any provision for the intervention of the judge on his own initiative was significant. It would be, if there were any provision in those rules for the recalling of an order before it had been perfected on the application of a party. But as there is no such provision, that argument does not convince me. In my judgment the judge can act on his own initiative.

Lastly, it was argued that in the present cases I ought not to intervene. In my judgment when, owing to the special circumstances of these cases, they sprang to my mind on reading that the House of Lords had decided that orders of the sort which I had pronounced ought not to be made, and when I realized that persons who were not parties were affected by them, it was my plain duty to recall them. It was contended that these orders were necessarily beneficial to the infants, unascertained and unborn persons affected. But I cannot accept that proposition as axiomatic. It would be a matter for consideration at the rehearing (if the question of jurisdiction could be surmounted) whether the schemes were in the changed circumstances still beneficial. *Chapman* v. *Chapman*[16] may have wider repercussions. I do not know.

Accordingly I recall the three orders which I pronounced. I should have proceeded to rehear the cases. But nobody wishes me to do so, because the result is a foregone conclusion. Accordingly, I now pronounce orders dismissing these three applications.

Applications dismissed.

J. A. G.

The plaintiffs in the first and third cases appealed.

Sir Hartley Shawcross Q.C., *Raymond Jennings Q.C.* and *Lindsay Jopling* for the plaintiff tenant for life in the first appeal.

F. G. King for the respondents other than the trustees.

J. M. Price for the trustees.

Sir Hartley Shawcross Q.C. and *D. A. Ziegler* for the plaintiff tenant for life in the second appeal.

B. S. Tatham for certain infants interested.

Sir Hartley Shawcross. The point at issue is one of philosophic interest and of some practical importance. There is no conclusive authority on it, but it must be conceded that the weight of authority, such as it is, appears to be against the appellants. The question does not appear ever to have been argued out as a single and substantial point. It is conceded, of course, that a judge is entitled to amend his judgment if there has been some slip or error in it, but it is submitted (1) that the judge had no jurisdiction, because of the result of a later decision which altered the law, to recall the orders he had originally made in chambers which were in accordance with the authorities at the time they were made, and (2) that in any event the judge had only a discretionary jurisdiction in the matter, and in the present cases ought not to have exercised it in the way in which he did.

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[16] [1954] 2 W.L.R. 723.

[Hodson L.J. For the purposes of the question raised by these appeals, is there any distinction between proceedings in chambers and those in open court?]

It is believed that no distinction can be drawn. If there is an unfettered discretion in the judge to recall an order he has made it would appear to apply equally to either class of proceeding. The sheet anchor of the appellants' case is *Ex parte Hookey, In re Risca Coal and Iron Co.*[1]

[Hodson L.J. When that decision was given Lord Westbury was sitting as a judge of the Chancery Division, was he not?]

That is so, but none the less his opinion is of great authority. The leading case for the contrary view to that expressed by Lord Westbury is *In re Australian Direct Steam Navigation Co.*[2] (*Miller's* case). In that case, before an order was drawn up, the case was reheard because the attention of the court had not been called to a particular article in the articles of association in a company; and in the later case of *In re St. Nazaire Co.*[3] Sir George Jessel M.R., referring to *Miller's* case,[2] said: "In *Miller's* "case[2] no order had been drawn up. A judge can always "reconsider his decision until the order has been drawn." In that case the question was not argued, but it appears to have been accepted that the practice was to allow a judge to vary an order before it was drawn up. In *In re Adam Eyton Ld.*[4] there are contradictory dicta by two judges of the Court of Appeal on the question of the power of a judge to rehear a case before his order previously made has been drawn up, so the case is not of much value as an authority. The only case where there appears to be a clear decision on the question, as distinct from an obiter

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[1] (1862) 4 De G.F. & J. 456.

[2] (1876) 3 Ch.D. 661

[3] (1879) 12 Ch.D. 88, 91.

[4] (1887) 36 Ch.D. 299.

HARRISON'S SHARE UNDER A SETTLEMENT, *In re.* ROPNER'S SETTLEMENT TRUSTS, *In re.*

expression of opinion, is *In re Roberts*,[5] where Kay J. said that "where an order had not been drawn up, whether it were an "order made in chambers or in court, the judge had a right, if "something was brought to his attention which he had not sufficiently considered, to stay the drawing up of the order and "rehear the matter before making a final order." [*In re Suffield and Watts*,[6] *Preston Banking Co.* v. *William Allsup & Sons* [7] and *Millensted* v. *Grosvenor House* (*Park Lane*) *Ld.*[8] were cited.]

[VAISEY J. Do you draw any distinction between the case of a judge reconsidering the case on the application of one of the parties and one where he does it of his own motion?]

It is submitted that once the judge has disposed of a matter by giving an oral judgment he ought not to intervene again unless invited so to do. Although a judge may have a limited discretion to correct any mistake in his judgment, it is submitted that he cannot reverse his decision in order to secure conformity with the existing law. [*Moons Motors Ld.* v. *Kiuan Wou* [9] was cited.]

The entry of a judgment is a purely ministerial act with which the judge is not required to be concerned at all, and Ord. 41, r. 3, says that unless otherwise directed a judge's order is to be dated on the day the judgment is given and shall take effect from that date. It is somewhat curious that in none of the cases which have been cited was any reference made to the view expressed by Lord Westbury L.C. in *Ex parte Hookey*, *In re Risca Coal and Iron Co.*[10]

In conclusion, although it may be conceded that the line of authority may be against the appellants, it is submitted that the line is a very slender one. In many of the cases referred to the decisions with regard to the powers of a judge were reached without argument and such decisions are not, perhaps, the surest foundations of good law. It is submitted that after a judge has pronounced his judgment in chambers or in court, unless something is brought to his notice by the parties, he ought not to be in any way concerned with the executive action of the clerks in the scrivenry department. He has nothing to do with the drawing up of the order and it would be very strange if the validity and finality of the order of the judge were made to depend on whether some clerk in the scrivenry department was dilatory or diligent. Even if it was clear that a judge had power to review his oral judgment, the question still remains whether it was right in the present case for the judge to exercise his discretion, if discretion there were. The mere clarification of the law in some other court is not a ground for exercising the discretion.

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[5] [1887] W.N. 231.

[6] (1888) 20 Q.B.D. 693, 696, 697.

[7] [1895] 1 Ch. 141.

[8] [1937] 1 K.B. 717, 727; 53 T.L.R. 406; [1937] 1 All E.R. 736.

[9] [1952] 2 Lloyd's Rep. 80, 85.

[10] 4 De G.F. & J. 456.

Raymond Jennings Q.C. followed. Counsel for the other parties joined with the appellants in submitting that the appeals should be allowed.

Cur. adv. vult.

December 21. JENKINS L.J. read the following judgment of the court in which he stated the facts and continued: The submissions in support of the appeals are to the effect: First, that, in general, an order is made once and for all at the time when it is orally pronounced, and cannot thereafter be discharged or varied otherwise than on appeal. Secondly, that by way of exception to this general rule a judge may have a limited discretionary power of varying or discharging an order orally pronounced by him at any time before it is perfected by entry, but any such power is confined to cases of manifest error or omission or, in other words, cases broadly speaking comparable to those in which an order can be corrected after entry under R.S.C., Ord. 28, r. 11. Thirdly, that in any case a judge should not vary or discharge an order between oral pronouncement and entry, on his own initiative, as distinct from doing so on the application of one or other of the parties. Fourthly, that if and so far as there is any such discretionary power the judge should not have exercised it as he did in these two cases. Fifthly, that for the purposes of the foregoing submissions there is no valid distinction between an order orally pronounced in chambers (as were the two orders now under consideration) and one so pronounced in open court.

We accept the last of these submissions, and agree that nothing turns on the fact that the two orally pronounced orders with which we are concerned were pronounced in chambers, while those substituted for them were made in open court. But we reject the limitations sought to be placed by the first three submissions on the power of a judge to recall his own order at any time before it has been perfected by entry. So far as the limitations involved in the first and second submissions are concerned, these seem to us to be plainly inconsistent with practice and the weight of authority, but it has been argued that if the practice is wrong it is not too late for the court to say so, and that the authorities are founded on obiter dicta which are

C. A.

1954

HARRISON'S SHARE UNDER A SETTLEMENT, *In re.* ROPNER'S SETTLEMENT TRUSTS, *In re.*

later in date than an authority which ought to be followed and which was not brought to the notice of the court in the later cases.

We take the first three submissions together, for in our opinion it can make no difference to the answer to the question whether a judge can recall his own order before it can be perfected that in one case his attention has been drawn to some relevant consideration of law or fact by one of the parties to the matter under consideration, whereas in another case he has made the discovery for himself by his own diligence or even by accident. It is true that the cases cited to the court have all been cases in which a judge has varied his order after application had been made by one of the parties either for that purpose or at any rate in such a way as to give an incidental opportunity for revision, but those cases would naturally be more common than cases in which a judge might act on his own initiative. In the cases under consideration there was no opposition, and it was in the interest of no one to ask the judge to recall his order. These three submissions would, we think, if accepted, produce an unworkable result. Few judgments are reserved, and it would be unfortunate if once the words of a judgment were pronounced there were no locus poenitentiae. The appellants make a nominal concession to meet this difficulty by saying that the judge retains seisin of the matter so long as the parties are before him but that once the parties have left the court and the next case has been called, it is too late because the parties may have already acted on his oral judgment. Our answer to this is that although the judgment dates from the day of its pronouncement it is not perfected until drawn up, passed and entered, and anyone who acts on it beforehand must take such risk as there is that it will be drawn in the form in which it was heard to be pronounced.

We think that an order pronounced by the judge can always be withdrawn, or altered, or modified by him until it is drawn up, passed and entered. In the meantime it is provisionally effective, and can be treated as a subsisting order in cases where the justice of the case requires it, and the right of withdrawal would not be thereby prevented or prejudiced. For example, the granting of an injunction, though open to review, would generally operate immediately, that is, as soon as the relevant words are spoken. But an order which could only be treated as operative at the expense of making it, in effect, irrevocable, for example, an order for the payment of money, cannot be treated as operative until it has been passed and entered. Where the nature of the case requires it, the process of passing and entering can be accelerated by the judge's direction, and this is often done in the Chancery Division.

A reported example is *In re Thomas, Bartley* v. *Thomas*,[1] in which a contract for the sale of land required the approval of the court and it was argued that all that was required by the contract was that the receiver should apply for and endeavour to obtain the approbation of the court to the contract. That requirement, it was contended, was satisfied when the master expressed his approbation, and from that moment the purchaser's rights crystallized and the contract became binding. This argument was rejected in no uncertain terms by Warrington J. He said[2]: "Now, is the matter open? The purchaser says that all "that was provided for by this contract was that the receiver "should apply for, and endeavour to obtain, the approbation of "the Chancery Division to this contract, and in case such appro-"bation could not ultimately be obtained the agreement should "be void; and he says that that provision is satisfied when the "master has said 'I approve of this contract,' whether that "approval is recorded in the form of a note, or whether it is "made in the form of an order or not. As a matter of fact the "master here purported to make an order, and I think it was "necessary that he should make an order, because at that "moment the order for sale with the approbation of the judge "was a conditional order. He could make it because he had "jurisdiction to do so under Ord. 51, r. 1. He intended to "make an order. What is it that renders an order finally effec-"tive so that there is no longer any possibility of going back from "it? It seems to me that it is the passing and entering of the "order. It is the everyday practice that, until an order is passed "and entered, the matter can be brought before the judge, and "if a mistake has been made it can be put right. But the "matter does not rest there. This was an order made by the "judge in chambers, that is to say, in this particular case made "by the master as the deputy of the judge. It is the right of "any party interested to adjourn a question from the judge's "deputy to the judge himself"—Then after some further discussion of the question of adjournment to the judge, the judge said this[3]: "I think that is the correct way of dealing with "the matter for the reason that, until the order is finally passed

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[1] [1911] 2 Ch. 389.
[2] Ibid. 395.
[3] Ibid. 396.

"and entered, it leaves open an opportunity of reviewing and "reconsidering what has been done."

The authority mainly relied on by the appellants is the decision of Lord Westbury L.C. sitting in the Chancery Division in *Ex parte Hookey, In re Risca Coal and Iron Co.*[4] No doubt a literal reading of the language used by the Lord Chancellor supports the appellants' contention that no order can be varied by the judge who pronounced it even before it has been passed and entered. In that case Lord Westbury said at the beginning of his judgment[5]: "I have very little doubt how this question "ought to be determined. It has been urged upon me that I "must construe the word 'made' as it occurs in the particular "section of this Act of Parliament as equivalent to 'orally pro-"'nounced.'" Then a little further on he said[6]: "But I am "willing to take the question which I have to determine without "any special regard to the policy of this particular statute, and "it is fairer to the appellant himself so to take it, than to pray "in aid the general intent of the Act. I regard it as a question "of very considerable importance. If I permitted any doubt "to be entertained upon it, the extent of that doubt it is scarcely "possible to foresee. It might bring the whole of the computa-"tion of the periods of time defined by the orders or by the "statutes into a great degree of inconvenient uncertainty. It "is better, therefore, to abide by one certain and positive rule, "and I have not the least doubt that that rule is to be derived "from the uniform principle and practice of the court that has "been abided by without any variation, and which has always "determined the date of its orders. An order of the Court of "Chancery, however long a time may elapse in the ministerial "duty of drawing up that order and committing it to paper, is "made to bear date on the day when it is pronounced by the "court. That date appears in the document in which the order "is recorded, and the principle, therefore, involves of necessity "this consequence, that the order must be accepted for all "purposes as having been made on the day on which it is dated." Then a little further on, his lordship continued[7]: "The greatest "possible confusion would arise were it otherwise. In fact, all "persons dating their rights from the time of the order being "pronounced would be thrown into a state of most inconvenient "uncertainty, if they could not exhibit to another court, or "produce for the purpose of any legal inquiry the order containing

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[4] (1862) 4 De G.F. & J. 456.

[5] Ibid. 457.

[6] Ibid. 458.

[7] Ibid. 459.

"the directions of the court with the date, in the certainty that "that date will be accepted as the time when the order is made." Then, further on again, he said[8]: "The principle which makes "the order, whenever drawn up and entered, to bear date on the "date when it is pronounced by the court, I hold to be one in "perfect conformity with the whole theory of judicial procedure. "The theory of judicial procedure is that the cogent and binding "effect of the order begins immediately from the time when the "order is pronounced by the lips of the judge, and if that could "be done physically which legally is supposed to be done, and "which one would desire to be done if it were possible, every "order would be completed on the spot, written out by the "judicial officer and in curia before the court rises, and delivered "to the parties. That is the unquestionable theory of judicial "procedure, and in conformity with that theory that is the time "when the order is 'made,' for the two words must be considered "as equivalent and capable of being substituted the one for the "other. The mere defining of the words of the court by writing "and reducing them into a form in which they can be evidence "is a ministerial operation which, according to the true theory, "succeeds the delivery of the order by the judge, and must be "in point of fact nothing in the world more than the physical "embodiment on the spot by the court of the words which the "judge has used."

It must be remembered, however, that the only decision in the case was that for the purpose of computing the time allowed for appealing, an order was "made" at the time when it was pronounced, and although the Lord Chancellor based this conclusion on the principle that an order took effect from the date of its pronouncement, and was at pains to point out that in an ideal system every order would be completed on the spot, it does not seem to us to involve the proposition contended for, that after the words have passed his lips, and before the order is perfected, a judge who has in his belief delivered an erroneous judgment, has no power to recall it.

This course was taken by Sir George Jessel M.R. in *In re Australian Direct Steam Navigation Co.* (*Miller's* case).[9] It is said that this might well have been by consent of the parties, but if jurisdiction was in question this would not affect the validity of the authority. It is to be observed that in this case the Master of the Rolls, after he had given an oral judgment and

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[8] 4 De G.F. & J. 456, 459.

[9] (1876) 3 Ch.D. 661.

C. A.
1954

HARRISON'S SHARE UNDER A SETTLEMENT, *In re.* ROPNER'S SETTLEMENT TRUSTS, *In re.*

before the final order was made and perfected, considered other material to which his attention had not previously been drawn. The same judge later referred to *Miller's* case [9] in *In re St. Nazaire Co.*,[10] in these words: "In *Miller's* case [11] no order had "been drawn up. A judge can always reconsider his decision "until the order has been drawn up." In *In re Roberts* [12] Kay J. regarded himself as free, where an order had not been drawn up, whether it were an order made in chambers or in court, to stay the drawing up of the order and rehear the matter before making a final order. He acted accordingly.

The case of *In re Adam Eyton Ld.*[13] contains conflicting dicta of Fry and Cotton L.JJ. on this topic, but the appellants are entitled to say that the judgment of the Court of Appeal treated as an effective order an earlier order than the one on appeal although the earlier one had not been drawn up. This case, therefore, lends some support to the argument of the appellants. In *In re Suffield and Watts, Ex parte Brown* [14] the order had been perfected but Fry L.J., repeating his earlier dictum in *In re Adam Eyton's* case,[15] said [16]: "*In re St. Nazaire* [17] shows that, when an "order or judgment of the High Court has once been perfected, "the court has no jurisdiction to alter it. So long as the order "has not been perfected the judge has a power of re-considering "the matter, but, when once the order has been completed, "the jurisdiction of the judge over it has come to an end." In *Preston Banking Co.* v. *William Allsup & Sons* [18] A. L. Smith L.J. expressly assented to what Fry L.J. had said in *In re Suffield and Watts*,[19] and also referred to the *St. Nazaire* case [20] in support of the proposition. In *Millensted* v. *Grosvenor House (Park Lane) Ld.*[21] the trial judge, after delivering his oral judgment and before it had been drawn up, reduced the amount of damages awarded from £50 to £35. The Court of Appeal upheld the order. Farwell J. said [22]: "It is now well settled, "that until an order made by a judge has been perfected, by "being passed and entered, there is no final order, and conse- "quently the judge may, at any time until the order is so "perfected, vary or alter the order which he had intended to

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[9] (1876) 3 Ch.D. 661.
[10] (1879) 12 Ch.D. 88, 91.
[11] 3 Ch.D. 661.
[12] [1887] W.N. 231.
[13] (1887) 36 Ch.D. 299; 3 T.L.R. 738.
[14] (1888) 20 Q.B.D. 693.
[15] 36 Ch.D. 299.
[16] 20 Q.B.D. 693, 697.
[17] 12 Ch.D. 88.
[18] [1895] 1 Ch. 141, 144.
[19] 20 Q.B.D. 693.
[20] 12 Ch.D. 88.
[21] [1937] 1 K.B. 717; 53 T.L.R. 406; [1937] 1 All E.R. 736.
[22] [1937] 1 K.B. 717, 726.

"make: see *In re Suffield and Watts, Ex parte Brown.*[23]" In the more recent case of *Moons Motors Ld.* v. *Kiuan Wou*[24] the same principle was applied by the Court of Appeal on appeal from a county court judge.

The appellants' fourth submission, to the effect that if there is a discretionary power to recall an unperfected order the judge was wrong in exercising that discretion in these two cases, is based mainly on the contention that inequality of treatment between litigants is likely to result in cases such as these owing to the variation in time between the pronouncement of orders and the "ministerial duty" of drawing them up and "committing them to paper." We were told that other orders in similar cases orally pronounced before the decision of the House of Lords but not perfected by the time that decision was made known have nevertheless been allowed to proceed to completion by entry, and to take effect accordingly. It was also submitted that as the orders orally pronounced in the present two cases were at the time of their pronouncement orders proper to be made according to the authorities as they then stood, and the judge was then well aware of the possibility that these authorities might be displaced by the expected decision of the House of Lords in *Chapman* v. *Chapman*,[25] the subsequent realization of that possibility did not suffice to justify the judge in going back on the decisions he had previously reached and orally pronounced without any misapprehension of fact or law.

As to the argument based on inequality in the treatment of litigants, the question for this court is whether Roxburgh J. was justified in recalling the two orders with which we are concerned, and not whether some other judge ought to have recalled other similar orders. Inequality is, moreover, inevitable in all cases falling within a given field of law where the House of Lords arrives at a decision to the effect that the law in that field is not as hitherto understood. Cases determined before the House of Lords' decision go one way, and cases determined after it go the other, whether the date of determination is taken as being the date when the order is orally pronounced or the date when the order is perfected. Whichever date is taken, the result must necessarily depend on circumstances purely accidental, whether they relate to the state of the lists or the state of business in the scrivenry department, or the length of time for which the House of Lords find it necessary to reserve their decision.

[23] 20 Q.B.D. 693.

[24] [1952] 2 Lloyd's Rep. 80, 85.

[25] [1954] A.C. 429.

C. A

1954

Harrison's Share under a Settlement, *In re.* Ropner's Settlement Trusts, *In re.*

Moreover, while it so happened that in the two cases now before the court it was claimed to be in the interests of all parties that the orders should go in the form in which they were orally pronounced, there might equally well be a case in which the interests of all parties demanded that a fresh order should be made on the basis of the law as declared by some supervening decision of the House of Lords before the original order was perfected. To take by way of example an imaginary inversion of the two instant cases: if the decisions of this court in the *Downshire* and *Blackwell* cases [26] had imposed some restriction on the jurisdiction of the court to vary trusts, and if Roxburgh J., following those cases, had by his orders as orally pronounced refused to sanction the schemes proposed in the two cases now under appeal on the ground that he had no jurisdiction to do so, and if before those orders were perfected the House of Lords' decision in *Chapman* v. *Chapman* [27] had supervened with a pronouncement to the effect that there was no jurisdiction in law for any such restriction, we find it difficult to suppose that it would not have been contended on behalf of all parties that Roxburgh J. should recall his two unperfected orders, and proceed to consider the two applications on their merits in accordance with the law as laid down by the House of Lords. But if the appellants are right, it must follow that in the hypothetical circumstances Roxburgh J. would have been constrained to say in effect: "It "is true that the House of Lords' decision shows me to have "been wrong in refusing these applications in limine, and that "the orders which I orally pronounced before that decision was "made known will when drawn up, passed and entered in "accordance with the language I then used, be plainly at "variance with that decision. Nevertheless, I am irretrievably "bound by what I then said. The orders must therefore proceed "to completion, wrong as they are now known to be, and you "must be put to the expense of taking them to the Court of "Appeal, who will certainly reverse them, and either proceed to "hear you on the merits, or, more probably, remit the applica-"tions to me in order that I may do so." We venture to think that in the hypothetical circumstances we have stated it would be more reasonable, and better for the parties, if the judge could say: "The orders which I orally pronounced are now shown by "the House of Lords' decision to have been wrong. But they "are not yet perfected. I will therefore recall them and rehear

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[26] [1953] Ch. 218.

[27] [1954] A.C. 429.

"the two applications on their merits." It is also pertinent to consider the position which would arise in a contested case in which a decision of the House of Lords made known after the oral pronouncement of the judge's order but before its completion by entry showed the order as orally pronounced to have been founded on a misconception as to the law. If the appellants are right, then, no matter how clearly it might appear from the House of Lords' decision that the judge's order as orally pronounced was erroneous, such order would have to proceed to completion, and the dissatisfied party would be faced with the necessity of appealing as the only means, short of agreement, which might or might not be possible, of putting the matter right. We cannot think that this would be a desirable state of affairs.

It is important to remember that in the ordinary way the recall of an unperfected order results in a rehearing at which all parties can present such further arguments as they may be advised having regard to the matter, whatever it may be, which is sought to cast doubt on the correctness of the order as orally pronounced. But in the present cases the parties found it impossible to contend that the schemes were such as could properly be sanctioned by the court since the decision of the House of Lords in *Chapman* v. *Chapman*,[27] and accordingly did not avail themselves of the rehearing offered by Roxburgh J. This appears from the last paragraph of his judgment, where he said: "I should have proceeded to rehear the cases, but nobody "wishes me to do so because the result is a foregone conclusion."

As to the argument to the effect that the orders orally pronounced by the judge were proper orders at the time of their pronouncement and should therefore be allowed to stand, this seems to us to be based on the erroneous supposition that *Chapman* v. *Chapman* [27] altered the law, whereas in truth that decision merely declared the law as it always was, and showed it to have been theretofore misapprehended in the courts below.

The law having been declared by the House of Lords in *Chapman* v. *Chapman* [27] before Roxburgh J.'s orders were perfected, in terms which clearly indicated that those orders ought not to have been made, and this having come to the judge's knowledge, it was in our opinion right that he should recall the orders orally pronounced by him, notwithstanding the fact that at the time when they were pronounced they appeared to be correct according to the authorities as they then stood. When

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[27] [1954] A.C. 429.

C. A.
1954

HARRISON'S SHARE UNDER A SETTLEMENT, *In re.*
ROPNER'S SETTLEMENT TRUSTS, *In re.*

a judge has pronounced judgment he retains control over the case until the order giving effect to his judgment is formally completed. This control must be used in accordance with his discretion exercised judicially and not capriciously. The judge in these two cases exercised his discretion judicially in recalling his original orders, and there is in our opinion no ground for disturbing the orders finally made. These appeals therefore should be dismissed.

Appeals dismissed.

Solicitors: *Theodore Goddard & Co.; Pontifex, Pitt & Co.; Tamplin, Joseph & Flux for Darling, Heslop & Forster, Darlington.*

P. B. D.

C. A.

1954
Nov. 19, 22, 23;
Dec. 18.

Evershed M.R., Jenkins and Birkett L.JJ.

MOORHOUSE (INSPECTOR OF TAXES) *v.* DOOLAND.

Revenue—Income tax—Employment—Perquisites or profits—Professional cricketer—Collections made for a meritorious performance—Under contract of employment collections payable to cricketer—Whether collection moneys subject to tax—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. E, r.* 1.

A taxpayer, being a cricket professional, was employed under a contract made in 1949 between the East Lancashire Cricket Club and himself upon the terms that he should be paid a salary and a certain sum for expenses and talent money; and it was further provided that "collections shall be made for any meritorious "performance by the professional with bat or ball in certain "matches" in accordance with the rules for the time being of the Lancashire Cricket League. The taxpayer played in 25 matches in the cricket season of 1951 and on eleven occasions collections were made on his behalf under the club's rules and the total sum of £48 15s. was collected. He was assessed to tax in that sum, the Crown claiming that it was subject to tax under rule 1 of Schedule E of the Income Tax Act, 1918, as being "fees, wages, perquisites or "profits" arising from his employment:—

Held, (1) that the test of liability to tax on a voluntary payment made to the holder of an office or employment is whether, from the standpoint of the person who receives it, it accrues to him by virtue of his office or employment, that is, by way of remuneration for his services; (2) that if the recipient's contract of employment entitles him to receive the voluntary payment, whatever it may amount to, that is a strong ground for holding that, from the standpoint of the recipient, it accrues to him by virtue of his employment, or by way of remuneration for his services; (3) that the fact that the voluntary payment is of a periodic or recurrent character affords a further, but less cogent, ground for the same conclusion;

(4) that on the other hand, if a voluntary payment is made in circumstances which show that it is given by way of present or testimonial on grounds personal to the recipient, the proper conclusion is likely to be that the voluntary payment is not a profit accruing to the recipient by virtue of his office or employment but a gift to him as an individual, paid and received by reason of his personal needs or by reason of his personal qualities; and (5) that, applying those principles, the proceeds of the collections were by the terms of his contract of employment received by the taxpayer as part of what he was to get by way of remuneration or reward and the collections were liable to tax.

Herbert v. *McQuade* [1902] 2 K.B. 631; 18 T.L.R. 728; 4 T.C. 489 and *Blakiston* v. *Cooper* [1909] A.C. 104; 25 T.L.R. 164; 5 T.C. 347 considered.

Seymour v. *Reed* [1927] A.C. 554; 43 T.L.R. 584; 11 T.C. 625 distinguished.

Decision of Harman J. reversed.

APPEAL from a decision of Harman J. affirming a decision of the General Commissioners for the purposes of Income Tax of the Division of Blackburn, in the county of Lancaster.

The taxpayer, Bruce Dooland, was a professional cricketer. By a contract dated August 27, 1949, made between the East Lancashire Cricket Club and the taxpayer, he was engaged by the club as a cricket professional for the seasons 1950 and 1951. By the terms of the agreement he was to be paid a salary and certain expenses and in addition talent money and collections to be made for him in accordance with the rules of the Lancashire Cricket League for any meritorious performance by him in Lancashire League or Worsley Cup matches. The terms of the agreement and the rules of the league are fully stated in the judgment of Evershed M.R.

The taxpayer was assessed to tax under Schedule E of the Income Tax Act, 1918,[1] in respect of the sum of £48 15s. 0d., being collections made on his behalf during the season 1951. His appeal against that assessment was allowed by the General Commissioners who by case stated raised the question of law for the opinion of the High Court whether, on the evidence before them, the commissioners were entitled to hold that the collections in question were not a profit arising from the taxpayer's employment within the meaning of the statutes. Harman J. affirmed the decision of the commissioners.

The Crown appealed.

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[1] Income Tax Act, 1918, Sch. E, r. 1: "Tax under this schedule shall "be annually charged on every "person having or exercising an "office or employment of profit . . . "in respect of all salaries, fees, "wages, perquisites or profits whatsoever therefrom. . . ."

R. Borneman Q.C. and *Sir Reginald Hills* for the Crown. This case has been brought to get rid of an anomaly, for while footballers' benefits are taxed, cricketers' collections are not. This payment was a perquisite of the professional's service; it was something which attached to him because he was a professional cricketer. The word "perquisite" in rule 1 of Schedule E of the Act of 1918 is very wide: see *M'Donald* v. *Shand*,[2] where it was held that money paid by way of commission on the profits of a business was a perquisite of a managing director. See also the definition of "perquisite" in the Shorter Oxford English Dictionary. By the terms of the contract of service the public were held out to the professional as the paymasters when the qualifying feats were performed; it might, of course, have been provided that the club should make some payment to the professional if and when the qualifying feats were performed. *Seymour* v. *Reed* [3] is distinguishable, for there a collection was normally made only once for each cricketer. It was not a recurrent right and was not rooted in any way in contract; but here as a term of the contract the professional got the right to solicit and to receive a collection as part of his reward. The collections were held as a matter of routine, and the payment, provided that he qualified for it, was no more unexpected than the receipt of his salary.

[BIRKETT L.J. If there had been no contract, but it could be shown that by settled custom a collection was made for a professional, would you say that any amount so received by him would be taxable?]

If the payments received are profits of the employment, it does not matter that they do not come from the employer. In *Herbert* v. *McQuade* [4] the increment to the basic stipend came from outside the diocese, and in *Blakiston* v. *Cooper* [5] the Easter offerings were not received solely from the parishioners. There was no contractual right to the tips in *Calvert* v. *Wainwright*,[6] but they were, nevertheless, held to be taxable. In the present case the donation was made for the services rendered by the cricketer; the public paid, because they knew that this was a custom.

[JENKINS L.J. The professional did not get the collections because he was the professional; he got them because of his skill;

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[2] 1922 S.C. 555; 39 T.L.R. 444; 8 T.C. 420.

[3] [1927] A.C. 554; 43 T.L.R. 584; 11 T.C. 645.

[4] [1902] 2 K.B. 631; 18 T.L.R. 728; 4 T.C. 489.

[5] [1909] A.C. 104; 25 T.L.R. 164; 5 T.C. 347.

[6] [1947] K.B. 526; 63 T.L.R. 199; [1947] 1 All E.R. 282; 27 T.C. 475.

though, admittedly, he would not have got them if he had not been the professional.

[EVERSHED M.R. In *Calvert* v. *Wainwright*[6] the payment had nothing to do with the particular services rendered by a particular driver or with the personal characteristics of the driver; there is an understood obligation to pay a tip to a taxi-driver in addition to the stated fare.]

Whatever may be in the donor's mind when making the payment, the professional gets the money because of the terms of his contract of service. These collections were not exceptional; it was expected that the professional would perform these feats, and he did, in fact, do so frequently. The incomings to the professional were as regular as the tips to a taxi-driver, and in earning them he was doing only that which he was employed to do.

[EVERSHED M.R. The right to receive payment arises because the professional has performed a brilliant feat; he is not under contract to do that. The Easter offerings in *Blakiston* v. *Cooper*[7] were not given because the clergyman had preached a brilliant sermon, but because the recipient was the clergyman and it was Easter Sunday.]

The Crown relies on the decisions in *Herbert* v. *McQuade*[8] and *Blakiston* v. *Cooper*,[9] which show that, if moneys are payable to a man by virtue of his office, such moneys are chargeable to income tax. The present case is distinguishable from *Seymour* v. *Reed*.[10] In that case the moneys paid to the cricketer from his benefit match were an exceptional payment. The payment cannot be said to have been made to him in the course of his employment. On the facts found in this case, which are not in dispute, these moneys were paid to Mr. Dooland pursuant to his contract of employment, which contemplated that he should be remunerated in part by collections. He received them in his character of a professional cricketer. There is no distinction in principle between tips paid to taxi-drivers, Easter offerings to the clergy and these payments to Mr. Dooland. All such payments are earnings from the employment. [Reference was also made to *Davis* v. *Harrison*[11] and *Corbett* v. *Duff*.[12]]

Sir Reginald Hills following. In considering the question it is important to bear in mind the words of the taxing Act. Rule 1 of Schedule E brings into tax "all profits whatsoever" from the employment. The fact that the remuneration is collateral is immaterial. The payment is within the rule, if it is made pursuant to the contract of employment: *Radcliffe* v. *Holt.*[13] The motive of the donor is not material. The question is: In what capacity is the money received? If it is received for work done, it is taxable. There is no hardship in such moneys being taxable; they are part of the receiver's remuneration. The Easter offering cases are now 50 years old and Parliament has not seen fit to change the law. [Reference was made to *Beynon* v. *Thorpe.*[14]]

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[6] [1947] K.B. 526.

[7] [1909] A.C. 104.

[8] [1902] 2 K.B. 631.

[9] [1909] A.C. 104; 25 T.L.R. 164; 5 T.C. 347.

[10] [1927] A.C. 554.

[11] (1927) 43 T.L.R. 623; 11 T.C. 707.

[12] [1941] 1 K.B. 730; 57 T.L.R. 429; [1941] 1 All E.R. 512; 23 T.C. 763.

F. N. Bucher for Mr. Dooland. Whether a payment is subject to income tax depends on whether it is made in respect of service rendered by the payee to the payer. There must be privity of service but not necessarily privity of contract. Unless the payee has rendered services within the scope of his employment to the payee no tax is payable. [Reference was made to *Calvert* v. *Wainwright*[15] and *Hunter* v. *Dewhurst.*[16]] These payments to Mr. Dooland were spontaneous acts of bounty from the public. There is no case in which a payment to an employee by a third person has been held to be taxable. In the Easter offering cases the payments were made to the incumbent pursuant to a religious duty: *Blakiston* v. *Cooper.*[17] These payments were made to Mr. Dooland not in his capacity as professional cricketer of this club but as a tribute to him personally from the public for exceptional cricketing achievements. The motive of the giver is a relevant consideration. The principles laid down in *Seymour's* case[18] apply here, and these moneys, being a personal gift, are not taxable. [Reference was made to *Constantinesco* v. *Rex.*[19]]

R. Borneman Q.C. in reply. The collections were a constituent part of Mr. Dooland's reward for his services. This is a mixed question of law and fact. There was no evidence to support the commissioners' findings in this case. In *Calvert* v. *Wainwright*,[20] the taxi tips case, there was a finding by the commissioners that the tips were personal gifts, but they were held to be taxable.

Cur. adv. vult.

December 15. The following judgments were read.

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[13] (1927) 11 T.C. 621.

[14] (1928) 44 T.L.R. 610; 14 T.C. 1.

[15] [1947] K.B. 526.

[16] (1931) 16 T.C. 605.

[17] [1909] A.C. 104.

[18] [1927] A.C. 554.

[19] (1926) 43 T.L.R. 727; 11 T.C. 730.

[20] [1947] K.B. 526.

Evershed M.R. In this appeal the question is whether the Crown are entitled to recover income tax in respect of a sum (not finally ascertained, but treated for the purposes of the proceedings as amounting to £48 or thereabouts) which represents the proceeds of collections made at cricket matches during the cricket season of 1951 for his own benefit by or on behalf of Mr. Bruce Dooland, a professional cricketer employed as such at the relevant dates by the East Lancashire Cricket Club, one of the clubs commonly known as "the Lancashire League."

Mr. Dooland was at the relevant dates assessed for tax—and, as is agreed, rightly assessed—under Schedule E of the Income Tax Act, 1918, his service as cricket professional being an "employment" which, as the result of section 18 of the Finance Act, 1922, was translated from the scope of Schedule D to that of Schedule E. It follows that Mr. Dooland's liability has to be tested having regard to the well-known language of rule 1 of Schedule E ". . . all . . . fees, wages, perquisites or profits "arising therefrom," that is, from the employment concerned. The Crown have not relied upon any of the special words, for example, particularly "perquisites" in this rule. This, in the event, is not therefore a case related to any of the peculiar differences between the terms of Schedule D and Schedule E or their respective rules. The question is whether, upon the whole facts of the case as proved and found, these collections were in truth and in substance part of Mr. Dooland's earnings as a professional cricketer and taxable as such: whether they fall fairly within the words which are found in the rule applicable to Case II of Schedule D, "all profits and earnings of whatever "value arising from" the employment, a formula which for present purposes may be taken as synonymous with that quoted from the rule applicable to Schedule E.

Since all cases of comparable character must, in my judgment, turn upon their exact facts, I find it desirable to quote at some length from the case stated and the documents annexed thereto.

Mr. Dooland's engagement was governed by a contract in writing dated August 27, 1949, and made between Mr. Eli Higham, on behalf of the East Lancashire Club, of the one part and Mr. Dooland of the other part. By that contract Mr. Dooland agreed to serve as cricket professional to the club for the two seasons of 1950 and 1951. Clauses 2 and 3 were in the following terms: "2. The salary payable by the club to the professional shall be "the sum of £800 for each of the said two seasons to be paid by "equal weekly payments throughout the said seasons or in such

" other manner or at such other times as may be mutually agreed " upon and the club shall also pay in each of the said seasons " the sum of £150 for or towards the cost of one passage for the " professional between Australia and England. 3. Talent money " shall be paid to the professional by the club at the rate of one " guinea for each and every score of fifty runs made by the " professional in any Lancashire League or Worsley Cup match " in which the club takes part during the term of his engagement " and also a like sum on every occasion on which he obtains six " wickets or performs the hat trick in any such match. Collections shall be made for any meritorious performance by the professional with bat or ball in any Lancashire League or Worsley " cup match in accordance with the rules for the time being of " the Lancashire Cricket League." As will later appear, the last sentence of clause 3 is, in my view, of particular importance.

There followed a number of clauses strictly regulating Mr. Dooland's obligations as to playing in club matches, acting as coach and the like; including provisions, in the event of Mr. Dooland's incapacity, enabling the club to engage a substitute at a remuneration to be paid, up to a stated limit, by Mr. Dooland, and also in certain circumstances to determine the agreement. The final clause, 13, was as follows: " Provided " always and it is hereby declared that this agreement is made " subject to the rules for the time being in force of the " Lancashire Cricket League, a copy of which has been produced " to the professional and such rules so far as they relate to the " professionals engaged by any Lancashire League Club and so far " as they are not hereby varied or inconsistent herewith shall be " read with this agreement and deemed to be incorporated herein."

There was, in fact, no express obligation on Mr. Dooland's part to play in the matches to the best of his ability; but it may no doubt be assumed from the nature of the engagement and of the game of cricket that he would do so, and that he would be encouraged to such efforts by the provisions for talent money and collections in clause 3.

The relevant rules of the league are also set out in the case. At the date of the contract, 1949, rule 33 was, as set out in paragraph 3 (2) (b) of the case: " Each club must play one " professional, but not more than one, in league matches; the " whole of a professional's remuneration must be in the form of " a weekly wage plus usual talent money and collections, and " all other forms of payment such as benefit matches, commission on gate money, agreement signing fee, etc., are strictly "forbidden. All professional agreements must be deposited with "the league secretary within 14 days of completion thereof, and "shall then be examined by him to see that they conform to the "league rules. The knowledge of any part of the agreement "shall be confined to the President and Honorary Secretary, "unless they decide that the interests of the League require "that any portion of the agreement should be laid before the "league committee. All agreements must contain the following "clause: 'The said .... shall not at any time during the "'continuance of this agreement play in any cricket match other "'than the matches arranged by the .... cricket club "'without first obtaining the consent of the committee of the "'said club in writing under the hand of the chairman or "'secretary of such committee.'"

This rule was altered before the opening of the 1950 cricket season by the omission from the opening paragraph of the words "and collections." It follows, therefore, that during the relevant seasons, "collections," according to the league rules and therefore to Mr. Dooland's contract, were not and could not be part of the professional's "remuneration" (as defined by rule 33); but they were still clearly permissible, and in fact made, in Mr. Dooland's case. Mr. Dooland's contract gave him the right to the benefit of such collections in the circumstances stated in the rules. In fact, during the seasons 1950 and 1951, collections were made by or for Mr. Dooland as a result of performances on his part which qualified him therefor on five and eleven occasions respectively. The claim in the present case (as I have already stated) arises from the latter. To judge from the list of fixtures in the rules annexed to the case, the East Lancashire Club played about 25 matches in the season. It appears from the case that the collections (which were made on the ground and might be made on the occasion of home or away matches) were handed, after counting, immediately to the player concerned, the club neither contributing to nor handling the money. It was stated in evidence by the treasurer of the East Lancashire Club that the financial standing of a club might influence a professional in deciding which club to join (a fact which appears to me obvious) and that in fact the East Lancashire Club was "the wealthiest and best supported" in the League.

On these facts Mr. Bucher, for Mr. Dooland, contended that since the performances which qualified a player for the taking of a collection were performances of exceptional personal prowess which, in Mr. Dooland's case, it was not his contractual duty to

C. A.
1954

MOORHOUSE
v.
DOOLAND.

Evershed M.R.

achieve, they were therefore distinct from and outside the scope of his employment and the sums collected represented (unlike talent money) not earnings, but the spontaneous expression by way of gift on the part of members of the public of their grateful pleasure in witnessing Mr. Dooland's skill. This argument was (according to Mr. Bucher) strongly reinforced by the facts: (i) that amateurs could qualify like professionals (albeit by reference to a somewhat less exacting standard) for the making and taking of collections, the true character of which could not differ from those taken for professionals but which, in the case of an amateur, could not constitute professional earnings; (ii) that the sums collected were small in comparison with the regular salary; and (iii) that there was no finding and no evidence that the possibility or expectation of collections had played any part in influencing Mr. Dooland to make the contract which he did. On these grounds, therefore, Mr. Bucher contended, applying the principle which has found similar judicial expression, including the language of that very experienced judge, Rowlatt J., in the cases to which I shall later refer, that these collections were "mere personal gifts" and not "by way of payment for his "services." Mr. Bucher further submitted that, in any case, the conclusion of the majority of the General Commissioners was one of fact and, there being no error of law shown, was conclusive.

But there emerge from the facts of the present case three circumstances of the most significant relevance: First, though it is true that Mr. Dooland qualified for the collections by excellencies of performance on his part, they were excellent performances of his professional duty as a cricketer, and they arose in the ordinary course of his service while playing as the cricket professional of the East Lancashire Club. Second, though the performances were exceptional, in the sense of being outstanding, they were not exceptional in the sense of being very rare and unlikely to be, save very occasionally at most, repeated. Third, and not the least, it was a term of Mr. Dooland's contract of service that on each occasion on which he performed his service with the requisite degree of skill, he should be entitled to invite subscriptions for himself from bystanders. It was a right capable of enforcement at law, if Mr. Dooland's employers infringed it by refusing to permit the taking of a collection when, according to the league rule incorporated in his contract, his performance had reached the qualifying standard. The right, in other words, was part of the consideration for his services flowing from his employers. And if the question were asked "What

C. A.

1954

MOORHOUSE v. DOOLAND.

Evershed M.R.

"is the right worth?" the corresponding question would be naturally provoked "How much in fact was collected?"

In light of these circumstances, my own conclusion on the facts is—unless I am precluded by a contrary finding of the commissioners—that the collections received by Mr. Dooland during the 1951 season constituted, in truth and substance, part of the earnings of his profession and cannot fairly be called "mere personal presents" distinct from his earnings. To put my conclusion in the form posed by Jenkins L.J. during the argument, if the question had been asked of Mr. Dooland at the end of the 1951 cricket season, What were his earnings as the East Lancashire Cricket Club professional? an answer which ignored altogether the proceeds of the collections would, by ordinary standards of common sense and accuracy, have fallen short of the truth.

I have said "unless I am precluded by a contrary finding of "the commissioners," and it will be convenient for me to dispose at once of this point made by Mr. Bucher. I cannot myself assent to the view advanced by Sir Reginald Hills that it is "dangerous" to leave matters of this kind—the discrimination between earnings arising from an employment on the one hand and mere personal presents on the other—to the commissioners as questions of fact. No doubt problems of this character commonly involve mixed questions of fact and law. But as Viscount Cave L.C. observed in *Seymour* v. *Reed*,[1] the Kent County cricketer: "The question to be answered is, as "Rowlatt J. put it, 'Is it in the end a personal gift or is it "'remuneration?'" And in many cases, at least—and more particularly perhaps where the sum involved is small—provided that the commissioners have been properly instructed upon the principles to be applied, the question will, as Rowlatt J. said, "in the end" be one to be answered, in my judgment, as a matter of substance, of common sense and therefore of fact. But, in the present case, the commissioners did not, as I understand them, purport so to answer the question. Paragraphs 8 and 10 of the case stated were thus expressed: "8. After due "consideration of the facts and the arguments submitted to them "the commissioners, by a majority, were of the opinion that the "collections in question were not a profit arising from the "respondent's employment within the meaning of the statutes "but were given as testimonials to his abilities." "10. The "question in law for the opinion of the High Court is whether

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[1] [1927] A.C. 554, 559; 11 T.C. 625, 646; 43 T.L.R. 584.

"on the evidence before them the commissioners were entitled "to hold that the collections in question were not a profit arising "from the respondent's employment within the meaning of the "statutes." In my judgment, therefore, the question in the present case has not been determined as a matter of fact conclusive in the courts. In *Seymour's* case,[2] above, the commissioners, after setting forth the rival contentions of the Crown and the subject—and after, indeed, a somewhat jejune statement of facts, on any view—stated their conclusion thus: "We, the "commissioners, . . . after due consideration of the facts and "arguments submitted to us, were of the opinion that the con-"tentions of the respondent were correct." Lord Carson, in the House of Lords, was able to treat this statement as a conclusive statement of fact; but I cannot find that any other of the noble lords or of the judges who heard the case was conscious of any embarrassment on this ground. In this respect, the present case is, in my judgment, of the same character as *Seymour's* case.[3]

We were referred to a number of well-known cases in which analogous questions had come before the courts—cases relating, for example, to Easter offerings, to the "benefits" enjoyed by a professional footballer or a professional county cricketer, to the "tips" given to a taxicab driver in augmentation of his fares. In these cases the relevant contrast, as I have already stated, was expressed as being between that which was in substance remuneration or earnings arising from the profession or employment as such, being taxable (on the one hand), and that which was (on the other hand) a mere personal gift and was not taxable. I have already referred to the language of Rowlatt J. approved and adopted by Lord Cave in *Seymour's* case.[3] I quote by way of further example language used by Lord Collins M.R. in *Herbert* v. *McQuade*,[4] which related to the so-called Clergy Sustentation Fund for augmentation of the stipends of the clergy: "If, as was contended by the incumbent, it was in fact a gift "personal to himself, I do not think it would fall within the "provisions of Schedule E; if, on the other hand, it accrued to "him by virtue of his office as incumbent, the respondent himself "could hardly dispute his liability."

In the context of the facts of those cases the contrast thus simply expressed was sufficient. I observe only that the alternatives were intended to be mutually exclusive—if the sum in question was a mere personal gift, then, ex necessitate rei, it was not received by way of earnings of the office or employment; and vice versa. But the attempt to apply the antinomy to the facts of the present case seems to me to have produced the result of an over-simplification or over-statement on each side of their respective cases. Mr. Bucher did not, of course, seek to contest the proposition that a sum received might be taxable earnings though it was given voluntarily; but it was his contention that since the contributions of the spectators were on their part entirely "spontaneous" donations, having no relation to any contract of employment between Mr. Dooland and his club, they could not, therefore, be earnings arising from that contract. Mr. Bucher relied also upon a passage from the judgment of Stirling L.J. in the same case of *Herbert* v. *McQuade*[5]: "A profit "accrues by reason of an office when it comes to the holder of "an office as such—in that capacity—and without the fulfilment "of any further or other condition on his part." And Mr. Bucher emphasized the point that the collections here in question were not made to Mr. Dooland because he was the professional member of the East Lancashire Club XI but because he had individually performed an outstanding cricketing feat. But, in my judgment, this argument disregards, inter alia, the special term of Mr. Dooland's bargain conferring upon him the right, in the appropriate circumstances, to solicit the collections. And it fails also, in my judgment, to pay due regard to another highly significant matter, namely, that the character of the sums received is to be ascertained and judged in relation rather to their recipient than to their giver. For that proposition I make a third citation from *Herbert* v. *McQuade*[6] where the Master of the Rolls referred to the "principle of law that a payment may be liable to income tax "although it is voluntary on the part of the persons who made "it, and that the test is whether, from the standpoint of the person who receives it, it accrues to him in virtue of his office: if it "does, it does not matter whether it was voluntary or whether "it was compulsory on the part of the persons who paid it." It follows, in my judgment, that a sum received may be earnings arising from the recipient's employment although it was a mere gift on the part of him who paid; and that it is not sufficient in this case merely to say that the collections were spontaneously given by members of the public in token of their admiration for a special feat of bowling or batting.

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[2] 11 T.C. 625, 628.

[3] [1927] A.C. 554.

[4] [1902] 2 K.B. 631, 641; 18 T.L.R. 728; 4 T.C. 489, 493.

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[5] [1902] 2 K.B. 631, 650; 4 T.C. 489, 501.

[6] [1902] 2 K.B. 631, 649; 4 T.C. 489, 500.

C. A.

1954

MOORHOUSE
v.
DOOLAND.

Evershed M.R.

It was said on behalf of the Crown that though a sum paid by an employer might be voluntary, in the sense that it was a "mere present" on his part, nevertheless if the fact of the payment was essentially attributable to the circumstance that the payee was his employee, it followed that the sum so paid was part of the employee's earnings and taxable as such. On this view Christmas boxes paid by an employer to an employee would or might be taxable. It is not necessary for me in the present case to decide whether such Christmas boxes are or are not taxable. But I am unable to assent to the wide proposition that if it be shown of a voluntary payment to an employee—whether a Christmas box, a wedding present or any other kind of gift—made by the employer or by a third party, that it was only made because the recipient was the employer's servant or that it would not otherwise have been made, therefore the sum is taxable; and accordingly that the collections in this case are taxable, because they owe the fact of their having come into existence to Mr. Dooland's contract with the East Lancashire Club. In my judgment, such a proposition is inconsistent with the decision in *Seymour's* case [7]; for it is clear that the renowned Kent professional indubitably owed his benefit, in one sense at least, to the fact that he had played cricket for many years as a professional for the Kent County Cricket Club and to the fact that the benefit was entirely organized on his behalf by the committee of the club which, in effect, contributed about one half of the total sum provided. The proposition, to my mind, confuses an incidental, albeit essential circumstance of the collection of the sum received, with its substantial character in the hands of the recipient. Thus in *Seymour's* case,[8] in the Court of Appeal, Sargant L.J. (in the course of his judgment dissenting from the view of the majority of the court which was rejected in the House of Lords) thus expressed himself [8]: ". . . the substantial reason "why these moneys were to be paid to Seymour was, not because "he had been a mere member of the Eleven and as part of an "addition to what was given to him by virtue of his office, but "as a personal present by way of recognition of the pleasure "that had been afforded to the patrons of the club and the "general public who had flocked to see the play, by the brilliance "of the particular individual cricketer's play." And Lord Cave L.C., in the same case,[9] immediately before his reference to

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[7] [1927] A.C. 524; 11 T.C. 645.

[8] 11 T.C. 625, 643.

[9] [1927] A.C. 554, 559; 11 T.C. 625, 646.

Rowlatt J. already quoted, had said that taxable payments under Schedule E "include all payments made to the holder of an "office or employment as such—that is to say, by way of "remuneration for his services, even though such payments may "be voluntary—but that they do not include a mere gift or "present (such as a testimonial) which is made to him on personal grounds and not by way of payment for his services."

It follows, in my view, that a gift or present made either upon some special occasion as a wedding, a century at cricket, a birthday or at a season of the year when it is customary to make presents, does not necessarily cease to be non-taxable merely because the ties that link the recipient and the giver are or are substantially those of service and are not or not exclusively those of blood or friendship; and this may still be so, although the present is (for example, whenever another century is made or according to custom at Christmas) repeated.

Seymour v. *Reed*,[10] from which I have already made citations, was naturally much referred to, being clearly upon its facts most akin of the decided cases to the present. In that case, the claim of the Crown to tax the benefit subscribed for Seymour was confined to that part of the total (in sum about half) which had in effect been contributed by the Kent County Club as representing the gate money paid at the benefit match which in the ordinary course belonged to the club. The Crown made no claim to—in the words of Rowlatt J. they "shied at"—that part of the fund which had been subscribed independently by members of the public. It was a point much stressed, and naturally, by Mr. Bucher, who referred to the Lord Chancellor's language[11]: ". . . those subscriptions, which are the spontaneous gift of "members of the public, are plainly not income or taxable as "such." In truth, as was observed passim in the judgments and speeches in *Seymour's* case,[12] there was no valid distinction in principle between the two kinds of contribution for the purpose of taxability; and the Crown, who have displayed no similar "shyness" in the present case, were disposed, as I understood Mr. Borneman, to admit that their concession in *Seymour's* case[12] was unnecessary and logically unsound. But, in my judgment, the facts, on which *Seymour's* case[12] was determined, are different in vital respects from those in the present case. The terms of Seymour's contract nowhere appear, but quite

[10] [1927] A.C. 554; 11 T.C. 625.

[11] [1927] A.C. 554, 560; 11 T.C. 625, 646.

[12] [1927] A.C. 554; 11 T.C. 625.

C. A.
1954

MOORHOUSE
v.
DOOLAND.

Evershed M.R.

plainly they did not include any right in any circumstances to a "benefit." At most, as Sargant L.J. observed, it was said to be a settled practice of the Kent Club to arrange a "benefit" for a professional, who had rendered long and distinguished service to the club, so that there might be some claim on the part of a cricketer after such service to expect a donation of that kind. But the grant or arrangement of a benefit was a matter entirely in the discretion of the club—as was also the method of disposition of the sum subscribed, which, according to the evidence, was not handed over to the professional but invested on his behalf as a means for providing for him after his retirement from the game. These circumstances, plus the facts that (according to the evidence), except in the rarest instances, a player had only one benefit and that one towards the end of his career as a professional, and that the sum subscribed was very large by comparison with the professional's regular salary (the converse of the present case) were the basis of the decision and have no correspondence with the facts of the present case.

In my judgment, therefore, *Seymour's* case [12] cannot be treated as an authority which ought to govern our decision in this case. On the facts of the latter, and particularly having regard to the three essential characteristics to which I drew attention earlier in this judgment, I conclude that the proceeds of the collections made in the year 1951 were, from the standpoint of Mr. Dooland, substantially earnings arising from his employment as cricket professional, and taxable as such. Whether the result would be the same if any one or more of those characteristics were absent, it is quite unnecessary for me to say. For example, if there was no right for Mr. Dooland by contract to have these collections—so that his position in that respect would be analogous to that of an amateur player in the League—and if the qualifying exploits were of such a kind, as, for example, the making of 50 runs and taking all 10 wickets in an innings in the same match, so that their achievement or repeated achievement could be regarded as altogether exceptional, the result might be different. I base my decision on, and limit it to, the particular facts proved and found in the case before us.

In the Easter offerings case—*Blakiston* v. *Cooper*,[13] Lord Loreburn L.C. said: "In my opinion, where a sum of money

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[12] [1927] A.C. 554.

[13] [1909] A.C. 104, 107; 5 T.C. 347, 355.

"is given to an incumbent substantially in respect of his services "as incumbent, it accrues to him by reason of his office. "Here the sum of money was given in respect of those services. "Had it been a gift of an exceptional kind, such as a testimonial, "or a contribution for a specific purpose, as to provide for a "holiday, or a subscription peculiarly due to the personal "qualities of the particular clergyman, it might not have been a "voluntary payment for services, but a mere present."

I observe that Lord Loreburn L.C. said "might not." Applying that language to the present case, although no doubt the collections were "testimonials" "peculiarly due to the "great qualities" of Mr. Dooland as a cricketer, in my judgment, for the reasons I have given, they were not mere presents so as not to be taxable but were, in Mr. Dooland's hands "substantially in respect of his services" as the club's professional.

Mr. Borneman contended that the facts of the case were so plain that res ipsa loquitur in the Crown's favour. I cannot agree. Although I think the Crown entitled to succeed, I have for my part found the case far from easy and have felt much sympathy with the view taken by the majority of the commissioners and by Harman J. Mr. Borneman, as I understood him, also suggested in opening that the decision of Harman J. involved an anomaly, unjust to parsons, as regards Easter offerings, and to professional footballers as regards their benefits. I cannot by any means assent to that suggestion. The case of the professional footballer is plainly quite different since, in his case, benefits appear to be payable at stated times by his employer as a term of his contract (see *Davis* v. *Harrison*).[14] As regards Easter offerings to the clergy, there is no doubt that to the extent that the facts relating to them correspond with the facts in *Blakiston* v. *Cooper*[15] they are taxable. The House of Lords so decided in that case in the year 1908 and Parliament has not since altered the law. With the income tax at its present rate, it might perhaps appear startling that those who on a particular Sunday—and that one of the most significant in the Christian Year—contribute to the collection in their church, should be rendering unto Caesar nearly half their contributions. But so undoubtedly it is. I observe, however, that the decision in *Cooper* v. *Blakiston*[15] turned largely upon the circumstance that the offerings there in suit had been prompted by a letter from the Bishop alluding to "the laudable "practice of making freewill offerings at Easter to the parish "clergy who are seldom sufficiently endowed," and Lord Phillimore in *Seymour's* case [16] referred to the historical connexion between Easter offerings and the common law Easter dues. Offerings made, therefore, in circumstances similar to those in *Blakiston* v. *Cooper* [17] must be regarded as systematic and recurrent augmentations of the stipends of the clergy. On the other hand, offerings made to a particular clergyman out of regard for and in relief of his particular circumstances may well still not be taxable (see *Turton* v. *Cooper* [18]).

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[14] (1927) 43 T.L.R. 623; 11 T.C. 707, 720.

[15] [1909] A.C. 104; 25 T.L.R. 164; 5 T.C. 347.

In any case, the clergyman, unlike the professional cricketer, is the holder of an office. In the case of the clergy the office (that is, that of the incumbent of a particular living) and its holder for the time being are clearly distinguishable. Easter offerings (as ordinarily understood) are contributions made to the holder of the office as such, so that (as has been observed) if a particular incumbent should die before the time arrived for payment of the offerings, they would go to his successor. Such considerations have no place in connexion with an employment such as that of a professional cricketer. In my judgment, the authority of *Blakiston* v. *Cooper* [19] is necessarily limited by its own particular facts.

The court, however, is not concerned with anomalies—save at least in those cases (of which the present is not one) in which it will tend to favour an interpretation of a doubtful matter of law or an obscure passage in an Act of Parliament or other instrument which will avoid anomalies. Here the court's duty is to relate particular facts to established principles. Since, however, the matter of anomalies was raised, I must observe that our decision in favour of the Crown may well be said to create an anomalous distinction between the large benefits received by professional county cricketers which are not taxable and the relatively small collections received by Lancashire League cricketers which are. An anomaly which may be thought more startling still arises within the Lancashire League itself, between the collections of the professional cricketer, which are taxable, and the collections of the amateur in corresponding circumstances, which (seemingly) are not; a point which strongly appealed

[16] [1927] A.C. 554; 11 T.C. 625.

[17] [1909] A.C. 104; 5 T.C. 347.

[18] (1905) 21 T.L.R. 546; 5 T.C. 138.

[19] [1909] A.C. 104; 5 T.C. 347.

to Harman J. and led him to the view that the contractual element in Mr. Dooland's collections was incidental only and should not be regarded as significant. In light of these considerations, I confess that I have reached my conclusion with little satisfaction or enthusiasm. But I think that the appeal must be allowed.

JENKINS L.J. If this had been the first case of its kind, there might have been something to be said for the view that the proceeds of the collections were not in their nature taxable at all, for the simple reason that these were not sums paid or provided by or at the expense of Mr. Dooland's employers, but were contributed voluntarily by spectators under no obligation to make any such payment, and were, accordingly, in the nature of casual profits as distinct from income derived from a regular source.

But it has long been settled that payments voluntarily made by third parties to the holder of an office or employment may, in some circumstances, be taxable as profits arising to such holder therefrom, although the immediate source from which they proceed consists in the generosity of persons on whom he has no legal claim.

The present case cannot therefore be dismissed on the short ground above suggested, and it becomes necessary to consider whether, on the authorities, the circumstances in which Mr. Dooland received the proceeds of these collections, albeit contributed voluntarily and by strangers to his contract of employment, were such as to make those proceeds when considered in relation to the nature and terms of his employment, "perquisites or profits ". . . therefrom" within the meaning of rule 1 of the rules applicable to Schedule "E" as applied to his case by section 18 of the Finance Act, 1922.

The circumstances in which voluntary payments may be made to the holder of offices or employments are obviously capable of wide variation from case to case, and each case must be judged by reference to its own facts; but the authorities indicate certain general principles to which regard should be had in determining whether the circumstances of a particular case are or are not such as to bring it within the line of tax liability.

In *Herbert* v. *McQuade*,[20] which concerned the liability of the vicar of a certain parish to tax on sums granted to him by the Queen Victoria Clergy Sustentation Fund, Collins M.R. said [21]: "Now that . . . is certainly an affirmation of a principle "of law, that a payment may be liable to income tax although "it is voluntary on the part of the persons who made it, and "that the test is whether, from the standpoint of the person who "receives it, it accrues to him in virtue of his office; if it does, "it does not matter whether it was voluntary or whether it "was compulsory on the part of the persons who paid it. That "seems to me to be the test; and if we once get to this—that "the money has come to, or accrued to, a person by virtue of "his office—it seems to me that the liability to income tax is "not negatived merely by reason of the fact that there was no "legal obligation on the part of the persons who contributed the "money to pay it."

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[20] [1902] 2 K.B. 631; 4 T.C. 489.

In the same case Stirling L.J. said [22]: "I think that a profit "accrues by reason of an office when it comes to the holder of "an office as such—in that capacity—and without the fulfilment "of any further or other condition on his part; and what we "have to determine is whether the sum in question does so come "to the holder of this office."

In *Cooper* v. *Blakiston*,[23] Lord Loreburn L.C. said: "In my "opinion, where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues "to him by reason of his office. Here the sum of money was "given in respect of those services. Had it been a gift of an "exceptional kind, such as a testimonial, or a contribution for "a specific purpose, as to provide for a holiday, or a subscription "peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, "but a mere present."

In *Seymour* v. *Reed*,[24] where tax was unsuccessfully claimed on the proceeds of a professional cricketer's benefit, Lord Cave L.C., after referring to the terms of rule 1 of Schedule "E," said: "These words and the corresponding expressions contained "in the earlier statutes (which were not materially different) "have been the subject of judicial interpretation in cases which "have been cited to your Lordships; and it must now (I think) "be taken as settled that they include all payments made to "the holder of an office or employment as such—that is to say,

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[21] [1902] 2 K.B. 631, 649; 4 T.C. 489, 500.

[22] [1902] 2 K.B. 631, 650; 4 T.C. 489, 501.

[23] [1909] A.C. 104, 107; 5 T.C. 337, 345.

[24] [1927] A.C. 554, 559; 11 T.C. 625, 646.

"by way of remuneration for his services, even though such "payments may be voluntary—but that they do not include a "mere gift or present (such as a testimonial) which is made "to him on personal grounds and not by way of payment for his "services. The question to be answered is, as Rowlatt J. put "it, 'Is it in the end a personal gift or is it remuneration'? "If the latter, it is subject to the tax; if the former, it is not. "Applying this test, I do not doubt that in the present case "the net proceeds of the benefit match should be regarded as "a personal gift and not as income from the appellant's employ-"ment. The terms of his employment did not entitle him to "a benefit, though they provided that if a benefit were granted "the committee of the club should have a voice in the applica-"tion of the proceeds. A benefit is not usually given early in "a cricketer's career, but rather towards its close, and in order "to provide an endowment for him on retirement; and, except "in a very special case, it is not granted more than once. Its "purpose is not to encourage the cricketer to further exertions, "but to express the gratitude of his employers and of the cricket-"loving public for what he has already done and their appreciation "of his personal qualities. It is usually associated, as in this "case, with a public subscription; and, just as those subscrip-"tions, which are the spontaneous gift of members of the public, "are plainly not income or taxable as such, so the gate moneys "taken at the benefit match, which may be regarded as the "contribution of the club to the subscription list, are (I think) "in the same category. If the benefit had taken place after "Seymour's retirement, no one would have sought to tax the "proceeds as income; and the circumstance that it was given "before, but in contemplation of, retirement does not alter its "quality."

In the same case Lord Phillimore (after referring to *Blakiston* v. *Cooper*[25] and *Herbert* v. *McQuade*[26]) said[27]: "In fact in "these cases of ministers of religion there is always, I think, some "element of periodicity or recurrence which makes another dis-"tinction between them and the cases of a single gift by an "employer or employers."

From these citations I deduce the following principles:—

(i) The test of liability to tax on a voluntary payment made to the holder of an office or employment is whether, from the standpoint of the person who receives it, it accrues to him by virtue of his office or employment, or in other words by way of remuneration for his services.

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[25] [1909] A.C. 104; 5 T.C. 347.

[26] [1902] 2 K.B. 631; 4 T.C. 489.

[27] [1927] A.C. 554, 570; 11 T.C. 625, 654.

(ii) If the recipient's contract of employment entitles him to receive the voluntary payment, whatever it may amount to, that is a ground, and I should say a strong ground, for holding that, from the standpoint of the recipient, it does accrue to him by virtue of his employment, or in other words, by way of remuneration for his services.

(iii) The fact that the voluntary payment is of a periodic or recurrent character affords a further, but I should say a less cogent, ground for the same conclusion.

(iv) On the other hand, a voluntary payment may be made in circumstances which show that it is given by way of present or testimonial on grounds personal to the recipient, as, for example, a collection made for the particular individual who is at the time vicar of a given parish because he is in straitened circumstances, or a benefit held for a professional cricketer in recognition of his long and successful career in first-class cricket. In such cases the proper conclusion is likely to be that the voluntary payment is not a profit accruing to the recipient by virtue of his office or employment but a gift to him as an individual, paid and received by reason of his personal needs in the former example and by reason of his personal qualities or attainments in the latter example.

Applying these principles to the facts of the present case, I find:—(i) that under his contract of service with the East Lancashire Cricket Club Mr. Dooland was entitled to make, or have made on his behalf, collections from spectators on the ground, whenever he achieved one of the performances in batting or bowling which carried the right to a collection according to the rules of the Lancashire Cricket League; and (ii) that occasions on which he attained one or other of the stipulated performances, and enjoyed a collection accordingly, recurred with considerable frequency, there having been no less than eleven such occasions during the 1951 season. According to the principles above stated, these facts afford cogent grounds for holding that the present case falls within the line of tax liability.

On the other hand it is to be observed:—(i) that in order to earn the right to a collection Mr. Dooland had not only to play in a given match, but also to achieve in the course of play one or other of the stipulated performances, and (ii) that according to the rules of the Lancashire Cricket League amateurs were entitled to make, or have made on their behalf, similar collections whenever they achieved like performances in batting or performances in bowling of a slightly less exacting standard.

Mr. Bucher, for Mr. Dooland, contends that these features of the present case show that spectators contributing to his collections were not contributing, albeit voluntarily, to the remuneration of Mr. Dooland as professional to the East Lancashire club but were merely expressing, in terms of cash, their spontaneous appreciation of a display of skill given by one of the players, who happened to be Mr. Dooland the club's professional, but might equally well have been any other player in the match, professional or amateur, who achieved a comparable performance. Mr. Bucher submits that the necessity of achieving one or other of the stipulated performances, in order to earn the right to a collection, amounts to a condition which suffices to take the proceeds of it out of the category of profits arising by virtue of the employment, and, in support of this submission, he refers to the observation of Stirling L.J. in *Herbert* v. *McQuade*,[28] to which I have already referred. Mr. Bucher further contends that while sums voluntarily contributed may be profits of an office or employment, there must, to bring them within the line of tax liability, be some nexus between recipient and contributor in the shape of services rendered by the former for the benefit of the latter. He says that while such a nexus may be said to exist between a taxi driver or waiter and a passenger or customer who gives him a tip, or between the vicar of a parish and a member of his flock who contributes to his Easter offering, there was no similar bond between Mr. Dooland and the spectators he helped to entertain.

I hope I will not be thought to undervalue these arguments, if I say that I regard them as disposed of by the application of the principle that the question whether a given receipt is a profit of an employment must be decided from the standpoint of the recipient. From the standpoint of Mr. Dooland, the proceeds of the collections were by the very terms of his contract of employment part of what he was to get under the contract by way of remuneration or reward for what he was to do under the contract. True it is that the amount of any collection would depend on the number and goodwill of the spectators present; but the terms of his employment entitled him, as of right, to collect what he could. True it is, also, that his right to collect depended on his achieving one or other of the stipulated performances; but that condition was itself a term of the contract. His right to talent money likewise depended by the terms of his contract on his attainment of specified feats in batting or bowling; but it could hardly be maintained that whatever talent money he might earn would not be profits of his employment. The term of his contract, giving him the right to collect, cannot be regarded as nugatory. It gave him a contractual right to do something which he could hardly have done without the permission of the club—that is to say, to solicit contributions from spectators on the ground. If the club had prevented him from collecting on attaining one or other of the stipulated performances, he could, I take it, have sued them in damages. Even in the case of an "away" match, where it was necessary for the club on whose ground the match was played to permit the making of a collection, Mr. Dooland's own club were, I take it, under a contractual obligation to him to apply for, or at all events to support his application for, such permission. I do not think that the rights given by the league rules to amateurs in the matter of collections really assist Mr. Dooland's case. If the proceeds of collections made by or for amateurs are not taxable, that is merely because they are amateurs playing cricket for their own amusement and not as a source of income. I do not think that Mr. Bucher's submission to the effect that sums paid voluntarily by third parties to the holder of an office or employment are only taxable if there is some nexus between the payer and the recipient in the shape of services rendered by the latter for the benefit of the former can be accepted. The presence of some nexus may no doubt support the conclusion that the payment in question is a profit of the office or employment, but it does not follow that the absence of any such nexus will necessarily conclude the matter the other way. Here the link between Mr. Dooland's employment and the proceeds of the collections is supplied by an express term in the contract of employment. Moreover, I am by no means satisfied that there is any such distinction, as Mr. Bucher seeks to draw for the purposes of the submission, between tips voluntarily given to a taxi-driver or waiter who has rendered services to the payer in the shape of transportation or attendance and the contributions made by spectators to a collection for Mr. Dooland who by his skilful play had helped to entertain them.

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[28] [1902] 2 K.B. 631, 650; 4 T.C. 489, 501.

Mr. Bucher also submitted that this case resolved itself into a question of fact, which was concluded by the commissioners' decision. But in my view the question involved is essentially a mixed question of fact and law which was open to Harman J. and is open to this court, and which was correctly stated by the commissioners in paragraph 10 of the case as being " whether on the evidence before them the commissioners " were entitled to hold that the collections in question were " not a profit arising from the respondent's employment within " the meaning of the statutes."

For the reasons which I have endeavoured to state, I am of opinion that this question should be answered in the negative and would accordingly allow the appeal.

BIRKETT L.J. It is with some regret that I have come to the clear conclusion that this appeal should be allowed. At the end of his judgment Harman J. made it quite plain why he decided the case in Mr. Dooland's favour. Speaking of the collections which the Crown sought to tax he said: " In what " capacity does (the money) come to this recipient? Does it " come to him because he is the professional employed by the " East Lancashire Club, or does it come to him because he " strikes the person who pays it as being a very brilliant cricketer " on that particular Saturday afternoon? Those are the questions " the commissioners had before them. . . . The commissioners " came to the view that these were personal testimonials to the " skill of the respondent as a cricketer, and were not paid to " him because he was the professional employed by the East " Lancashire club. They did not, in other words, arise out of " his office or employment but were personal tributes to him."

The judge then went on to treat the findings of the commissioners as findings of fact which they were entitled to make, and with which he would not interfere. But as I read paragraphs 8 and 10 of the case stated, the commissioners did not purport to make the findings of fact, but expressed an opinion, and stated the question of law for this court " whether they " were entitled to hold that opinion on the evidence before them."

In my judgment the opinion expressed by a majority of the commissioners and supported by Harman J. " that the collections " in question were not a profit arising from the respondent's " employment within the meaning of the statutes but were given " as testimonials to his abilities " was clearly wrong. Mr. Dooland is a very distinguished cricketer and on August 27, 1949, he entered into the contract with the East Lancashire Cricket Club the terms of which have been read by Evershed M.R. The East Lancashire Cricket Club belonged to the Lancashire Cricket League and Mr. Dooland served the club as professional in the years 1950 and 1951.

It is the terms of this contract which make it impossible, in my view, to support the judgment of Harman J. It was not challenged that Mr. Dooland's service with the club was an "employment" under Schedule "E" of the Income Tax Act, 1918, or that his liability was to be governed by the words of rule 1 of that Schedule, the material words being "profits arising "therefrom."

Mr. Dooland was contractually entitled to the benefit of the collections taken up on the cricket grounds where he played, if he fulfilled the conditions laid down in the contract (which incorporated the rules of the Lancashire League); and, if necessity arose, he could enforce his contractual rights against the club at law. The assessment in the present appeal is upon the amount of money received by Mr. Dooland from the collections made in the cricket season of 1951, and those collections were made because of the provisions in the contract of August 27, 1949. That seems to me to be decisive. There was an employment and there were profits arising therefrom, and inexorably Schedule E and the rules come into operation.

The arguments for Mr. Dooland have been so fully considered in the two judgments that have been delivered that I will only add a very few words. I quite appreciate that the warm-hearted and generous Lancashire public were contributing their sixpences and shillings as a token of the pleasure that Mr. Dooland had given them when performing one of the feats laid down in the contract. They knew nothing of the contract, and would no doubt be much surprised to hear that Mr. Dooland was not going to get the whole of their gift. But Mr. Dooland knew what the terms of the contract were, and knew that the collections would be part of his profit when fulfilling his employment as the professional to the club, and whether he knew the money would be liable to tax is immaterial. The money given to these collections by the cricketing public from whatever motive, and however they are described, whether as gifts, testimonials, tributes or what not, seem to me to be governed for tax purposes by the provisions of the contract, and it is the recipient and not the giver who is the concern of the tax collector.

Seymour v. *Reed*[29] was naturally much relied on by counsel for the respondent, and the Master of the Rolls has dealt fully with the decision in that case so far as it relates to the present appeal.

It does appear to be a great anomaly that a famous cricketer may receive a benefit running into many thousands of pounds tax free, whilst a professional cricketer in Lancashire playing for a few brief seasons, and receiving small sums by way of collections, should be liable to tax. But the facts in *Seymour's* case[29] were quite different from the facts in the present case and it is quite clear that the present appeal cannot be determined by applying the decision in *Seymour's* case[29] to it.

I should have been glad to find, if I could, that the collections made to Mr. Dooland were essentially of the same character as the benefit given to Mr. Seymour, and to say that the collections were voluntary payments made by the cricketing public on grounds which were purely personal to Mr. Dooland because he was well liked and because of his cricketing skill, and were not a profit accruing to him by virtue of his employment. In my opinion, however, this case is concluded by the special facts, the chief and decisive fact being the contract of employment, which had provided for these very collections to be made to him in the circumstances which arose in this case.

I am in full agreement with the judgments of the Master of the Rolls and of Jenkins L.J., and in my opinion this appeal should be allowed.

Appeal allowed.

B. A. B.

Solicitors: *Solicitors of Inland Revenue; Gibson & Weldon.*

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[29] [1927] A.C. 554; 11 T.C. 625.

In re COCHRANE. SHAW *v.* COCHRANE AND OTHERS.

1954
Dec. 16, 17.
Harman J.

[1953 C. No. 793.]

Settlement — Omission — Marriage settlement — Funds settled in post-nuptial settlement by husband and wife—Income of trust funds for wife for life "so long as she shall continue to reside with" the husband—Power of appointment by surviving spouse—Limitation over on death of survivor—Disposal of income during period between death of husband and death of surviving wife—Resulting trust.

1954

COCHRANE,
In re.
SHAW
v.
COCHRANE.

By a post-nuptial settlement, dated August 17, 1898, the husband and wife each brought a fund into settlement and directed the trustees to stand possessed of both funds on trust to pay the income to the wife during her life so long as she should reside with the husband, and after her decease or the prior determination of the trust in her favour on trust to pay the income to the husband (if then living) during his life and after the decease of the survivor in trust for their issue as they should by deed or will jointly appoint and in default of appointment as the survivor should by deed or will appoint and in default of such appointment in trust for all their children who being sons should attain 21 or being daughters should attain that age or marry under that age in equal shares.

The trust for payment of the income of the trust funds to the wife determined before the death of the husband (on January 29, 1953), and he had accordingly been in receipt of the income of the trust funds.

There was issue two children of the marriage, one daughter, who died, a spinster and intestate, in 1942, having attained the age of 21 years, and another daughter, who also attained the age of 21 years and was the first defendant.

The sole surviving trustee took out a summons to determine the effect of the provisions contained in the settlement:—

Held, that there was a gap in the trusts declared by the settlement which could not be filled by construction, because it was impossible to see clearly what it was which would have to be inserted, particularly in view of the power of appointment, which prevented the remainder from vesting indefeasibly at the date of the ceasing of the husband's interest; and that there was a resulting trust of the income of the fund during the life of the wife in favour of the settlors respectively.

In re Akeroyd's Settlement [1893] 3 Ch. 363 distinguished.

ORIGINATING SUMMONS.

By a post-nuptial settlement, dated August 17, 1898, and made between Walter John Basil Cochrane of the first part, Emily Maud Cochrane of the second part, and two trustees of the third part, certain property was brought by the husband and by the wife into settlement and the trustees were directed to stand possessed of the husband's trust fund and the wife's trust fund on trust "to pay the income thereof to the said E. M. Cochrane "during her life so long as she shall continue to reside with "the said W. J. B. Cochrane and shall remain faithful to him "and so that she shall not have power to dispose thereof in the "way of anticipation and after the decease of the said E. M. "Cochrane or the prior determination of the trust in her favour "as hereinbefore mentioned upon trust to pay the said income "to the said W. J. B. Cochrane (if then living) during his life "and from and after the decease of the survivor of them the said

"W. J. B. Cochrane and E. M. Cochrane in trust for the issue "of the said W. J. B. Cochrane and E. M. Cochrane at such "age or time or ages or times (not being earlier than the age of "21 years or marriage) in such shares if more than one upon "such conditions and in such manner as the said W. J. B. "Cochrane and E. M. Cochrane shall by deed or deeds jointly "appoint and in default of such appointment and so far as any "such appointment shall not extend then as the survivor of them "the said W. J. B. Cochrane and E. M. Cochrane shall by deed "or will appoint and in default of such appointment and so far "as any such appointment shall not extend in trust for all the "children of the said W. J. B. Cochrane and E. M. Cochrane "who being sons shall attain the age of 21 years or being "daughters shall attain that age or marry under that age in "equal shares and if there shall be but one such child then" the settlors directed that the whole should be for that one child.

The trust for payment of the income to the wife had determined many years before the death of the husband—the wife having ceased to reside with him—and, at the date of his death on January 29, 1953, he was and had been for many years in receipt of the income of the trust funds.

There was issue of the marriage two children, namely, the defendant, Elaine Emily Cochrane, and Eleanor Violet Maud Cochrane. The latter died a spinster and intestate in 1942, having attained the age of 21 years.

The joint power of appointment was never exercised. Doubts having arisen as to the true construction of the directions contained in the settlement, the sole surviving trustee took out a summons to determine (1) whether in the events which had happened and, in particular, the execution of the deed poll of appointment, the trust funds were "held in trust (subject "to any prior trusts affecting the income thereof during the life-"time of [the widow]) for (a) the defendant Elaine Emily "Cochrane, or (b) as to one moiety for the defendant Elaine "Emily Cochrane and as to the other moiety for the personal "representatives (when constituted) of Eleanor Violet Maud "Cochrane deceased"; (2) whether the persons entitled to the income of the trust funds accruing between the death of the husband on January 29, 1953, and the execution of the deed poll of appointment were "(a) as to so much of the said income as "represents income of the husband's trust funds, the defendants "Nellie Florence Eady Cochrane, Elaine Emily Cochrane and "George Henry Seager Tatham personal representatives of [the "husband], and as to so much of the said income as represents "income of the wife's trust fund, the wife [who had remarried "and was now the defendant Emily Maude Theobald] (b) the "defendant Elaine Emily Cochrane or (c) as to one moiety thereof, "the defendant Elaine Emily Cochrane and as to the other moiety "thereof [the personal representatives of Eleanor Violet Maud "Cochrane] (d) some other and what persons"; (3) whether the persons entitled to the income of the trust funds after March 27, 1953, and during the remainder of the life of the wife were "(a) "the same persons as, in answer to question 2, may be held to be "entitled to the said income in respect of the period January "29, 1953, to March 27, 1953, or (b) as to so much of the said "income as represents income of the husband's trust funds, "the personal representatives of [the husband] and as to so "much of the said income as represents income of the wife's "trust funds, the defendant Elaine Emily Cochrane."

J. A. Plowman Q.C. for the trustee.

P. W. E. Taylor for a beneficiary under the settlement. There is a gap in the limitations and in that gap there is a resulting trust. *In re Akeroyd's Settlement* [1] is a parallel case, and is an authority for accelerating the gift and filling up the gap: that case has been regarded as the high-water mark of implication, and it ought to be followed. [Reference was also made to *In re Master's Settlement* [2] and *In re Tredwell.*[3]]

Timothy Barnes (with him *I. L. R. Romer*) for two other beneficiaries. In *In re Akeroyd's Settlement* [4] it was clear that the trusts which the settlor intended should take effect. Here, if the settlor had considered it, he might have provided for the contingency and he did not do so. [*In re Laing* [5] was also referred to.]

Michael Browne for the settlor's widow. The reason for the decision in *In re Akeroyd's Settlement* [6] was that the court saw one way of filling up the gap: see the judgment of Lopes L.J.[7] In the present case the forfeiture could not occur after the death of the husband. Here there were several possibilities and in that respect *In re Akeroyd's Settlement* [6] is distinguishable.

Cur. adv. vult.

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[1] [1893] 3 Ch. 363.
[2] [1911] 1 Ch. 321.
[3] [1891] 2 Ch. 640, 653.
[4] [1893] 3 Ch. 363.
[5] [1912] 2 Ch. 386.
[6] [1893] 3 Ch. 363.
[7] Ibid. 367.

HARMAN J. This is a summons arising out of a post-nuptial settlement dated August 17, 1898, the spouses being Walter John Basil Cochrane, who died in January, 1953, of the first part and his wife, who is now Emily Maud Theobald, the fourth defendant, of the second part, the husband and John Franklin of the third part being trustees. The plaintiff is now the sole trustee of that settlement. The settled property apparently now consists of certain freeholds and leaseholds which stand in the name of the plaintiff.

The first defendant, Elaine Emily Cochrane, is the only surviving child of the marriage. The second and third defendants are, with the first defendant, the personal representatives of the husband. There was issue of the marriage one other daughter, Eleanor, who died a spinster and intestate in 1942 having attained 21. She has no personal representatives, and anything falling in to her would go as to half to her father and half to her mother.

The settlement was in a somewhat unusual form. It recited pre-nuptial articles under which certain property was put into the wife's hands, though still an infant, and it recited that she had now attained 21 and had asked her husband to make the settlement, which he did make, and in consideration of that settlement by him she brought in on her side certain assets which were known as the wife's fund. The husband's settled property was known as the husband's fund. The value of the wife's fund was £1,150 and of the husband's fund £4,100. Both were vested in the trustees on certain trusts to invest and the beneficial limitations begin with a trust to pay the income to the wife during her life so long as she shall continue to reside with the husband and shall remain faithful to him. That is a very curious limitation. Then, after the decease of the wife "or the prior determination of "the trusts in her favour as hereinbefore mentioned upon trust to "pay the income" to the husband (if then living) during his life.

The wife did cease, many years ago, to reside with the husband, and the limitation in her favour thereupon came to an end, and for the rest of his life up to his death, in 1953, the husband received the income. The question before me is, what happens to the trust fund, or the income of it? The deed is silent on that matter, because after the limitation to the husband during his life it goes on in these terms: "And from "and after the decease of the survivor" of the husband and wife in trust for their issue as they jointly appoint, and in default as the survivor shall by deed or will appoint, and in default for all the children equally at 21, and so on.

On the face of the deed, therefore, there is no limitation until after the death of the survivor of the husband and wife; and in truth and in fact the draftsman has failed to see that he has not provided, as is usual in a marriage settlement, for life interests successively to the spouses and the remainder over after the death of the survivor, but has limited the period of the wife's interest to that during which she should reside with the husband. She has forfeited her interest by leaving him, and, he having died and she still being alive, there is on the face of it a gap in the limitations. On the one hand, it is said that that gap can be filled by construction, because one can see, on looking at the deed, what limitation ought to be there and, if that is sufficiently clear, then it can be inserted without rectification. The other view is that this is an oversight; no provision has been made and, therefore, until the time comes when the further limitations come into play, there is a resulting trust for each spouse of his or her fund.

It is a startling proposition that one can by construction fill up a gap of this sort, but there is the authority of the Court of Appeal for it in *In re Akeroyd's Settlement.*[1] In that case, which is not unlike the present case, there was a marriage settlement and funds belonging to the wife were limited to her for life with remainder to her husband until he should become bankrupt, with a limitation over after the decease of the survivor. The husband became bankrupt and then his wife pre-deceased him. The question was: Was there a gap? Held: "That the limitation "over had taken effect, and that the income of the trust fund "between the death of the wife and the death of the husband "belonged to the children."

Lindley L.J., after reciting the limitations for the husband and wife, said[2]: "That is intelligible enough. Then there is "a trust in remainder which does not fit all the events upon "which his interest"—that is, the husband's interest—"is to "cease. The gift over is confined to his death, and after the "decease of the survivor of the husband and wife—nothing being "said about bankruptcy, or assignment, or anything else—then to "the children. Then there are clauses of advancement by the "trustee with the consent of the husband. I confess that, "without knowing anything at all about the events which have

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[1] [1893] 3 Ch. 363.

[2] Ibid. 366.

" happened, about the date of his liquidation, the circumstances " of his discharge, and when these interests fell into possession, " but looking only at the recitals and at the operative part of the " deed, it does appear to me to be as plain as can be that the " real intention of the parties was that this property was to go " to the children upon the determination of the life interest " of their parents. I cannot doubt that for a moment. I do not " call that guessing. The intention is plain; but by a piece of " bad drafting the draftsman has failed to give full effect to that " plain intention, because in the gift over he has confined it to " one of the events instead of putting in some general words " which would cover the whole; but that particular kind of flaw " does not require a suit to rectify the instrument. The mistake " can be corrected by construction provided the intention is clear " and plain from the document itself."

Lopes L.J.[3] also thought that it was plain that the draftsman intended " to make a gift over on the determination by death " or by bankruptcy. I cannot help thinking that this is the clear " intention which is to be found upon this particular clause." Then he said that one could test it by seeing what would happen if there was a resulting trust, the husband being bankrupt. The income would all go to his creditors, which was the very thing the settlement was intended to prevent.

A. L. Smith L.J. concurred[4] and cited Lindley L.J. as having, in his judgment in *In re Tredwell*,[5] stated that: " it is " necessary ' to see something in the will,' " and the same is true of a settlement, " ' which convinces the mind that the " ' testator must have meant that these legacies,' the equi- " valent to the gift over in this case, ' should be paid at some " ' time or other different from what he has said.' " So, then, I am to be convinced that the draftsman clearly on the face of it intended the interests of the children to come into operation on the cesser of the interests of their parents. In other words, I am to read the words " from and after the decease of the " survivor of them," the husband and wife, as " subject to the " several interests of them," the husband and wife, and there is no doubt that " after the death of A." has in a good many circumstances been construed as " being subject to A.'s interest." The case of *Lill* v. *Lill*[6] is a good instance of that.

Is it clear not only that something has been left out but what it is that ought to be put in?—the second, of course, being much the more difficult part. One can see that the limitations over do not marry with the prior trusts. It should have been obvious to the draftsman that the event might happen which in fact has happened. But is it clear that the gift over ought, so to speak, to be accelerated? I do not think so on this particular deed, and I base that decision on this: that I cannot see clearly what it is which should have been put in. There is a power for the spouses to appoint to issue; there is a power for the survivor to appoint. Now, it is clear and conceded that the wife, notwithstanding that she forfeited her interest in her husband's lifetime, still has for the rest of her life—or had, at any rate, after her husband's death—power to dispose of the fund as the survivor of the two, either by deed or by will. That power clearly did not stop with the cesser of her interest, so that she could alter the beneficial trust by appointing away from the children in favour of the grandchildren or by making an unequal division between her daughters; and it seems to me in the face of that that it is impossible to say that the gift over took effect at the date of the ceasing of the husband's interest.

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[3] [1893] 3 Ch. 363, 367.

[4] Ibid. 368.

[5] [1891] 2 Ch. 640. 655.

[6] (1857) 23 Beav. 446.

It was admitted in fact before me that the fund could not be distributed so long as the power of appointment was outstanding in the survivor of the two spouses, and that alone seems to me to show that it could not be true to say that the gift over could operate until the event had happened which is stated to be the event in the deed; namely, the death of the survivor of the husband and wife.

The result of that is that the draftsman has failed to provide for the event which has happened. A resulting trust is the last resort to which the law has recourse when the draftsman has made a blunder or failed to dispose of that which he has set out to dispose of, but that seems to have happened here, and until the death of the survivor I think that there is a resulting trust of the income of the fund in favour of the settlors in proportion to their several interests.

Declaration accordingly.

The order as drawn up was as follows: This court doth declare upon the true construction of the above-mentioned settlement and in the events which have happened that the persons entitled to the income of the trust funds comprised in the said settlement accruing between the death of Walter John Basil Cochrane on January 29, 1953, and the death of Emily Maude Theobald are as to so much of the said income as represents income of the

1954

Cochrane, In re. Shaw v. Cochrane.

Harman J.

husband's trust funds the defendants Nelly Florence Eady Cochrane, Elaine Emily Cochrane and George Henry Seager Tatham as personal representatives of the said Walter John Basil Cochrane and as to so much of the said income as represents income of the wife's trust funds the defendant Emily Maude Theobald.

And the defendants by their counsel consenting to this order.

This court doth order that the plaintiff, or other the trustee or trustees for the time being of the said settlement do during such period as aforesaid divide the said income between the personal representatives of the said Walter John Basil Cochrane and the defendant Emily Maude Theobald in the proportion of 4,100 to 1,150 being the proportions borne by the husband's trust funds to the wife's trust funds as valued for the purposes of the said settlement.

Solicitors: *Preston, Lane-Claypon & O'Kelly; Gibson & Weldon for Bellamy-Knights & Griffin, Shoreham-by-Sea.*

J. L. D.

BULLOCK *v.* LLOYDS BANK LD. AND ANOTHER.

[1953 B. No. 1055.]

1954
Nov. 17, 18, 30.

Vaisey J.

Settlement—Voluntary settlement—Grounds for setting aside—Undue influence—Relationship of father and child—Settlement by daughter on attaining her majority—No independent advice—Father not actuated by any self-seeking motive—Father taking no interest in capital of settled fund.

Undue Influence. Laches—Settlement—Undue influence—Delay in setting aside—Attempt to persuade trustee to revoke under clause therein. Acquiescence.

The doctrine of undue influence is not confined to those cases in which the influence is exerted to secure a benefit for the person exerting it, but extends also to cases in which a person of imperfect judgment is placed or places himself under the direction of one possessing greater experience and also such force as that which is inherent in such a relation, for example, as that between a father and his own child.

On attaining the age of 21 on June 11, 1940, the plaintiff, then a spinster, became absolutely entitled to a sum of £12,000 under

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[Reported by J. A. Griffiths, Esq., Barrister-at-Law.]

the will of her deceased mother. On July 12, 1940, the plaintiff, at the request of her father, and with no advice other than that given by her father and his solicitor, executed a voluntary deed of settlement whereby she assigned to the trustee of the settlement the interest she had received under her mother's will without power of revocation save at the absolute discretion of the trustee. Under the settlement the plaintiff took a life interest in the settled fund and the deed contained, inter alia, a provision that upon her death and in default of an appointment in favour of any issue or husband who might survive her the fund was to be held on the statutory protective trusts for the benefit of her father and her brother for their respective lives.

In 1949 the plaintiff became aware that the validity of the deed might be brought into question. She was desirous of obtaining the capital of the settled fund and thereupon she endeavoured from time to time, but without success, to persuade the trustee to revoke the trusts of the settlement. On February 27, 1953, the writ in the action was issued in which the plaintiff sought a declaration that the deed of settlement was void and an order on the trustee for its delivery up for cancellation:—

Held, (1) that the deed must be set aside on the ground of undue influence; for, although the father in persuading his daughter to execute the settlement was not actuated by any selfish or self-seeking motive, nevertheless a settlement of this kind, made by a young girl who had barely attained her majority, could only stand if executed under the advice of a competent adviser who was capable of surveying the whole field of the intending settlor's interest with an absolutely independent outlook, and who explained to the intending settlor, first, that apart from the settlement she was at liberty to deal with her own property in whatever way she might think fit, and, secondly, that the scheme put before her was not to be accepted or rejected out of hand, but was to be discussed, point by point, with a full understanding of the various alternative possibilities; and, since the evidence established that the plaintiff's understanding of the nature and import of the settlement was very imperfect and incomplete, the settlement could not stand.

Lancashire Loans Ld. v. *Black* [1934] 1 K.B. 380 applied.

(2) That in the circumstances the plaintiff was not guilty of such laches or acquiescence as would disentitle her to the relief sought.

ACTION.

On June 11, 1940, the plaintiff (Mrs. Hazel Isobel Bullock) attained the age of 21 years and thereupon became absolutely entitled under the will of her deceased mother to certain funds ("the trust fund") which amounted to some £12,000 in value. In June, 1940, the plaintiff, then a spinster, was living at home with her father, Dr. Henry Macnaughton Macnaughton-Jones, and her stepmother, his second wife. On July 12, 1940, the plaintiff, at the request of her father and under no advice except that of her father and his solicitor, executed a deed of settlement of the trust fund made between the plaintiff of the one part and the defendant bank as trustee of the other part. At the date of the settlement, and for some time previously, the plaintiff's father was and had been pecuniarily embarrassed.

The plaintiff by this action sought a declaration that the deed was void and an order on the trustee for its delivery up for cancellation. In her statement of claim the plaintiff alleged that she executed the deed of settlement without legal advice, other than that given by her father's solicitor, and without understanding and knowledge of its true contents or effect, thinking that the settlement was to safeguard her capital only for a short period whilst she was inexperienced in financial matters, and that there would be no difficulty when she was of a greater age in regaining absolute control of the trust fund.

The settlement provided by clause 1 that the bank was either to permit the trust fund or any part thereof to remain in its then state of investment so long as the bank should think fit, or to sell and convert into money the same or any part thereof and invest the proceeds in any of the investments thereby authorized; but so that during the life of the plaintiff no sale, conversion, investment or reinvestment was to be made without her consent in writing.

By clause 2 a very wide investment range was provided for, and all transactions were to be subject to the plaintiff's consent.

By clause 3 the bank was to hold the income of the trust fund on the statutory protective trusts for the benefit of the plaintiff during her life.

By clause 4 after the death of the plaintiff the bank was to hold the fund in trust for her children or remoter issue as she should appoint, but by will or codicil only and not by deed, and in default of and subject to such appointment in trust for all her children attaining 21, or being female attaining that age or marrying, in equal shares if more than one, with the substitution of the children or child of a deceased child predeceasing the plaintiff.

Clause 5 was a hotchpot provision.

By clause 6 the plaintiff was empowered to appoint a life interest in favour of a surviving husband.

Clause 7 provided that subject to the foregoing trusts the income of one half of the trust fund was to be held upon protective trusts for the benefit of the plaintiff's father during his life and, subject thereto, the whole of the income was to be held upon protective trusts for the benefit of the plaintiff's brother. There was an ultimate trust for the issue of the plaintiff's brother or in default of such issue for the plaintiff's father on the statutory trusts during his life.

Clause 8 empowered the brother to appoint a life estate to a widow, and there were, finally, alternative trusts for the testamentary appointees of the plaintiff or for the plaintiff herself.

The settlement contained in clause 11 an overriding power for the plaintiff, with the consent in writing of the bank (which should only be given in what the bank deemed to be the best interests of the plaintiff, and which the bank should have an absolute discretion to give or withhold as it thought proper without incurring any responsibility in that behalf), by deed to revoke or vary all or any of the trusts and provisions therein contained concerning the whole or any part of the trust fund, and to declare any new or other trusts or provisions concerning the trust fund or any part thereof either in the plaintiff's own favour or in favour of any other person or persons.

The plaintiff first married in 1945, but that marriage, of which there was no issue, was annulled in 1949 In 1950 the plaintiff's marriage to her present husband took place and of that marriage there was no issue.

On May 15, 1949, the plaintiff's father died, and in that year the plaintiff became aware that the validity of the deed of settlement might be brought into question. From time to time, but without success, the plaintiff endeavoured to induce the defendant bank under the power contained in clause 11 of the deed to revoke the trusts and to allow her to receive the trust fund for herself. On February 27, 1953, the writ in this action was issued.

The defendant bank by their defence did not admit that the plaintiff only discovered the terms of the settlement after she had executed it. The bank referred to clause 11 of the settlement and averred that they were ready and willing to surrender to the court the discretion conferred upon them by that clause if the court should think it proper for them so to do. The bank were also ready and willing to exercise the discretion to the extent necessary to enable the plaintiff to confer upon herself a general testamentary power of appointment in the event of her dying without issue in priority to the trust declared by the settlement for the benefit of the plaintiff's brother, the second defendant, and his family. The defence also raised the question whether the laches, acquiescence and delay of the plaintiff in seeking the relief sought in this action disentitled her to such relief.

[The second defendant, the brother of the plaintiff, took no part in the proceedings.]

Fletcher-Cooke for the plaintiff. This settlement cannot stand for two reasons: first, because of the influence exercised by the plaintiff's father, and, secondly, because the plaintiff did not understand what she was doing. As to the first ground, the circumstances in which this settlement was executed show plainly that the plaintiff, who had just attained her majority, was under the influence of her father and that she was not independently advised. It is not suggested that the father or his solicitor were actuated by any improper motive in persuading the plaintiff to execute this deed, but at the time of its execution the father was in financial difficulties and his daughter was inexperienced in business matters. Further, under the terms of the deed the father, in the event of the plaintiff dying without having made an appointment in favour of any issue or husband who might survive her, takes a life interest in at least half the settled fund. It is also to be noted that the settlement contains no power of revocation save at the absolute discretion of the trustee of the settlement. It is plain, therefore, on the authorities that this deed must be set aside on the grounds of undue influence: *Everitt* v. *Everitt* [1]; *James* v. *Couchman* [2]; *Powell* v. *Powell* [3]; *Inche Noriah* v. *Shaik Allie Bin Omar*,[4] and *Lancashire Loans Ld.* v. *Black.*[5]

As to the second ground on which the validity of this deed is questioned, the evidence, including that given by the plaintiff herself, establishes that her understanding of the nature and import of the settlement at the time when it was executed was very imperfect, and, accordingly, she is entitled to have it set aside on this ground also: *Dutton* v. *Thompson.*[6]

The defence raises the question whether the plaintiff by reason of her laches, acquiescence and delay in seeking the relief sought in this action is debarred from obtaining it. The plaintiff denies that she is guilty of any such conduct. It was not until after the death of her father in May, 1949, that she became aware that the validity of the deed might be brought into question. Thereupon, from time to time in the succeeding four years she sought, but without success, to persuade the trustee under the power contained in clause 11 of the deed to revoke the trusts.

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[1] (1870) L.R. 10 Eq. 405.
[2] (1885) 29 Ch.D. 212.
[3] [1900] 1 Ch. 243, 245.
[4] [1929] A.C. 127, 132.
[5] [1934] 1 K.B. 380.
[6] (1883) 23 Ch.D. 278.

In any event, the present case is plainly distinguishable from *Allcard* v. *Skinner*,[7] for no one has been prejudiced by the delay (if any) in bringing this action, for this was a voluntary settlement under which there was always a power of revocation exercisable with the approval of the trustee.

E. Blanshard Stamp for the defendant bank. On the question of undue influence, it is to be observed that before the settlement the plaintiff was absolutely entitled to a sum of about £12,000, and that she was living in her father's house. It is true that the father asked her to help him in connexion with his financial troubles, but he also advised her to make a settlement, and under this settlement the father could not obtain any part of the settled fund except in the remote contingency of his daughter dying before him, she having made no appointment by will in favour of any issue or husband who might survive her. In these circumstances the presumption of undue influence does not arise, for it only arises in cases where the person in a fiduciary relationship, against whom the undue influence is alleged, obtains a benefit; in other words, where the adviser obtains a benefit. It is further submitted that the presumption does not arise where the adviser obtains so remote a benefit as is envisaged under the terms of this settlement. The present case is akin to *James* v. *Couchman*.[8]

On the evidence it is submitted that the plaintiff has failed to discharge the burden of proving that she did not understand the transaction into which she was entering. Accordingly, the court is left with the objective test of determining whether or not this was a proper settlement to have made in the circumstances. It is conceded that *Everitt* v. *Everitt*[9] laid down a very high standard for determining this question, but subsequent authorities show that the settlement is not necessarily avoided if the circumstances fail to reach that standard. The true test is whether the settlement as a *whole* was a provident or an improvident one to have made in the particular circumstances: *Dutton* v. *Thompson*.[10]

As to the question of laches, the doctrine does not rest on estoppel, but it is part of the policy of the law to discourage stale

[7] (1887) 36 Ch.D. 145.

[8] 29 Ch.D. 212.

[9] (1870) L.R. 10 Eq. 405.

[10] 23 Ch.D. 278.

demands. This is a very stale demand and reflects a marked change of attitude by the plaintiff. By August 8, 1949, she had been fully advised by her solicitors and she was aware of the objections to the validity of the settlement. She, however, endeavoured for the next four years to persuade the bank to revoke the trusts under clause 11 of the settlement. It is plain that the plaintiff's conduct amounted to an approval of the settlement. [Reference was also made to *Allcard* v. *Skinner*.[11]]

Fletcher-Cooke replied.

Cur. adv. vult.

1954, November 30. VAISEY J. read the following judgment: The plaintiff in this action, Mrs. Hazel Isobel Bullock, is the wife of Dr. Ernest Edgar Bullock. The first defendant, Lloyds Bank Ld., is sued as the trustee of a deed of settlement dated July 12, 1940, and expressed to be made between the plaintiff of the one part and Lloyds Bank Ld. of the other part. The second defendant, Verling Harris, is the plaintiff's brother. He takes no part in these proceedings. The plaintiff seeks a declaration that the said deed is void, and asks that it be delivered up for cancellation.

The facts are simple and not really in dispute. The plaintiff attained the age of 21 years on June 11, 1940. She thereupon became absolutely entitled under the will of her deceased mother to certain funds amounting to some £12,000 in value. She was then an unmarried girl and her name was Hazel Isobel Macnaughton-Jones. She was living at home with her father, the late Dr. Henry Macnaughton Macnaughton-Jones, and her stepmother, his second wife. She was embarking on a stage career, that being, she told me, her chief interest in life. Her father was then, and had for some time been, pecuniarily embarrassed, or, as she put it to me, "in terrific financial difficulties." Let me say at once that he dealt with the situation in a perfectly proper manner so far as the execution of this settlement is concerned, and I entirely acquit him of any selfish or self-seeking conduct in the matter. It must be remembered that the month which elapsed between the plaintiff's attainment of her majority and the execution of the settlement in question was one of grave national peril and consequent alarm. There can seldom have been a time so ill-suited for the arrangement of matters requiring calm consideration and balanced judgments.

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[11] 36 Ch.D. 145.

The settlement executed under the conditions which I have indicated provided as follows: [His Lordship referred to the terms of the deed and observed that under the provisions of clause 4 it was somewhat doubtful whether it was necessary for a child of the plaintiff to survive her in order to attain a vested interest, and continued:] In the year 1945 the plaintiff had married one Vernon Edward Kelso, but her marriage was annulled in 1949. Her marriage to her present husband took place on February 13, 1950. She has never had any issue. Her father died in the year 1949.

The settlement was executed by the plaintiff under no advice except that of her father and of her father's solicitor, the late Mr. Pepper. As a piece of draftsmanship it is not, in my judgment, altogether commendable, and the most serious defect in it is the absence of any general power of appointment to override the ultimate trusts other than those in favour of the plaintiff's own issue and surviving husband. Various alternative trusts and provisions ought also, I think, to have been suggested to her and would have been suggested to her if she had been more efficiently and not only separately but quite independently advised. I cannot believe, for instance, that she deliberately excluded the usual power to appoint the fund to a child inter vivos (for example, on marriage); and whether she really meant that no child of hers should participate in the fund unless that child survived her it is impossible to say because of an ambiguity in the clause itself.

I acquit the solicitor of anything more than a certain measure of carelessness in the preparation of the draft, but I think that he was handicapped by the fact that he was the father's solicitor and so, as I think, incapable of approaching the matter in a wholly dispassionate spirit. The expression "undue influence" is, to my mind, one of ambiguous purport. It is not confined to those cases in which the influence is exerted to secure a benefit for the person exerting it, but extends also to cases in which a person of imperfect judgment is placed or places himself under the direction of one possessing not only greater experience but also such force as that which is inherent in such a relation as that between a father and his own child. (See *Lancashire Loans Ld.* v. *Black*.[1]) If this matter had been considered by someone who was not thinking of the father's embarrassments or of any of the family difficulties except in regard to their effect upon the plaintiff herself, I think that a better document might well have been produced. It seems to me that the influence of the father exercised by him and through his solicitor was "undue" in the sense that its exercise had a necessarily constraining effect upon the mind of the plaintiff, who ought to have been placed in the hands of somebody who had been concerned to secure her interests and hers alone. I doubt very much whether she realized that neither her father nor her brother had any right to accept benefits from her, and that her wishes in regard to provision being made for them were essentially subject to change in the future. The settlement was obviously one dictated by the father, not with any sinister desire of benefiting himself, but without a sufficiently single-eyed concentration on his daughter's interests present and future apart from the interests of anyone else in the world. A fortune of £12,000 is, after all, a substantial fortune, and ought to have been tied up, if at all, only after the most careful consideration, and the certainty that the plaintiff not only understood what she was doing but also understood the large field of choice which was open to her in the matter. The very fact that the general power of appointment was omitted seems to me to indicate that she can have had no such understanding. I have considered (among others) the following cases cited to me: *Everitt* v. *Everitt*,[2] *Dutton* v. *Thompson*,[3] *James* v. *Couchman*,[4] *Powell* v. *Powell*,[5] *Inche Noriah* v. *Shaik Allie Bin Omar*,[6] and *Lancashire Loans Ld.* v. *Black*.[7]

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[1] [1934] 1 K.B. 380.

I had the advantage of hearing the plaintiff's evidence in the box, and I have been supplied with a transcript of the shorthand note of that evidence. Did she understand what she was doing? That is a very difficult question to answer. I am sure that Mr. Pepper explained to her the effect of the document, and that she took in what he said so far as her intelligence and understanding allowed. But the whole thing was, I think, done much too quickly. In the special circumstances of the time much more prolonged consideration should surely have been given to the matter. Even if she understood what she was doing when she executed the settlement, I cannot believe that she was really impressed as she should have been with the fact that it was not obligatory upon her to make any settlement at all. She told me that her idea when she went to see Mr. Pepper was that some arrangement was to be made whereby he, her father, "was sort "of got out of his troubles." That, of course, was entirely beside the point. I am not convinced that her mind was ever brought to the real point, and accepting Mr. Pepper's entries as a true record (as I do) I think that what was omitted was that she was never told that the settlement was one which she was not obliged to make at all, and gave effect to only one of many alternative arrangements which were open to her to make. Mr. Pepper was only known to her as her father's solicitor, and she had in fact never met him before. She tells me: "I thought it "was sort of making a trust which would look after my stocks "and shares and things until I knew more about it. I thought "that that was quite a good idea," and, in further answer to me, she said: "I thought Lloyds Bank would really be sort of acting "for me to advise me. I am afraid I did not understand." And at the interview which she had with Mr. Pepper alone she appears to have frankly told Mr. Pepper, according to her recollection, that she had not thought at all about who was to have her money if anything happened to her. A cut and dried scheme was put before her which was not altogether bad, although, if I may say so, rather crude. I do not believe that she ever understood clearly that she would never be able of her own free volition to, as she says, "touch" her money, and that whatever were the exigencies of her intended theatrical career or otherwise her money was to be placed irrevocably beyond her own unfettered control. She must no doubt have heard the word "protected," but I do not believe that she was ever told against whom or what she was to be protected or how such protection was intended to be secured.

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[2] (1870) L.R. 10 Eq. 405.
[3] (1883) 23 Ch.D. 278.
[4] (1885) 29 Ch.D. 212; 1 T.L.R. 305.
[5] [1900] 1 Ch. 243.
[6] [1929] A.C. 127; 45 T.L.R. 1.
[7] [1934] 1 K.B. 380.

Such a settlement as this is can, in my judgment, only be justified after prolonged consideration, being made, as it was, by a young girl only just of age, and can only stand if executed under the advice of a competent adviser capable of surveying the whole field with an absolutely independent outlook, and who explains to the intending settlor, first, that she could do exactly as she pleased, and, secondly, that the scheme put before her was not one to be accepted or rejected out of hand but to be discussed, point by point, with a full understanding of the various alternative possibilities. I accept Mr. Pepper's entries as a correct record, but I think that the matter was rushed. I think that Mr. Pepper did his best, and I think that the plaintiff's father did his best, but she was entirely in the hands of the two of them, and she ought to have been advised carefully, deliberately, separately and independently, which she was not. In my judgment she did understand what she was doing up to a point, but her evidence

1954

BULLOCK v. LLOYDS BANK LD.

Vaisey J.

convinced me that her understanding was so imperfect and incomplete that this settlement ought not, in my judgment, to stand.

The more difficult question is that of laches. The writ in this action was issued on February 27, 1953, and there is no doubt that the plaintiff had been aware of the objections to the validity of the settlement since the year 1949. I have been referred to *Allcard* v. *Skinner*,[8] in which a majority of the Court of Appeal held that acquiescence had in that case operated as a bar to the plaintiff's right. I have felt a great deal of difficulty about this. No doubt the plaintiff tried to be relieved from the embarrassments of the settlement by means of the power contained in the settlement itself, and for some four years she tried to secure the end which she seeks in this action by endeavouring to induce the defendant bank to revoke the trusts and to allow her to receive the funds for herself. That seems to me to involve an inconsistency of attitude on the plaintiff's part which has little real substance, and on the whole, though with hesitation, I think that the action should succeed and the plaintiff should be granted the relief which she seeks.

The criticisms which I have thought it right to make about the conduct of the plaintiff's father and his solicitor do not reflect at all on the honesty and integrity of either of them, and I think, as I have said, that each was trying to do his best in very difficult circumstances. Still less do I desire to condemn in any way Lloyds Bank Ld. or any of its officials; but I do think that any trustee, corporate or other, when taking over the property of a young girl just of age, would be well advised to make quite sure that the trusts have been constituted in circumstances which leave no doubt as to their full validity.

As the settlement is being set aside the defendant bank has no contractual right to its costs (see *Dutton* v. *Thompson* [9]); but I think that the bank in the present case certainly ought to have its full taxed costs and expenses in exactly the same way as though there were here an unexceptionable trust. Subject to the retention of such costs and expenses the funds must be transferred to the plaintiff or as she may direct, and with regard to any taxation of her own costs an order for that purpose will be made if she asks for it.

Judgment for the plaintiff.

Solicitors: *Hall, Brydon, Egerton & Nicholas; Lithgow, Pepper & Eldridge.*

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[8] (1887) 36 Ch.D. 145; 3 T.L.R. 751.

[9] 23 Ch.D. 278.

1954
Dec. 15, 16,
17, 21.

Upjohn J.

CHELSEA ESTATES INVESTMENT TRUST CO. LD. *v.* MARCHE AND OTHERS.

[1954 C. No. 3414.]

Mortgage—Leasehold—Redemption—Recovery of possession by landlord —Order for relief against forfeiture obtained by mortgagee—New lease—Sale by mortgagee as absolute owner—Action for redemption — Mortgage still subsisting — Mortgagor entitled to order for accounts and inquiries—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 146 (4).

Possession of leasehold premises, subject to a mortgage by way of legal charge, was granted to the landlords for non-payment of rent. On application by the mortgagee in the landlord's action the court made an order granting the mortgagee relief against forfeiture under section 146 (4) of the Law of Property Act, 1925, and ordered that the premises comprised in the lease should vest in the mortgagee "for all the residue of the term . . . granted by "the said lease." The mortgagor, in an action for redemption of the mortgage, claimed that the term vested in the mortgagee was an assignment of the old term and was subject to the mortgage; alternatively, that if it were a new lease it was a substituted security and similarly subject to the mortgage.

After the issue of the writ in the redemption action, the mortgagee had entered into a contract for the sale of the property, purporting to sell as absolute owner. The purchasers were joined subsequently as defendants:—

Held, (i) that the term granted by the order was not an assignment of the old lease, but constituted a new lease, in which the same terms and conditions as those contained in the old lease had to be implied.

(ii) That the new lease being for the protection of the mortgagee must be regarded as a substituted security and accordingly subject to the mortgage.

Ewart v. *Fryer* [1901] 1 Ch. 499, 512; 18 T.L.R. 590, *In re Biss* [1903] 2 Ch. 40 and *Nelson* v. *Hannam* [1943] Ch. 59; 59 T.L.R. 128; [1942] 2 All E.R. 680 applied.

(iii) That in the circumstances the mortgagor, who did not claim to restrain the mortgagee from proceeding with the sale, was entitled to an order for accounts and inquiries.

ACTION.

On April 18, 1952, the Prudential Assurance Company Ld., as landlords, granted a lease of two premises known as Nos. 35 and 36, Princes Square, Bayswater, in the county of London, to the first defendant, Peter Marche, for a term expiring in the year 2010 at a rent, after June 24, 1952, of £400 a year. The user of the premises was by the lease restricted to that of carrying on the business of a high class hotel or boarding house, and the lease contained the usual proviso for re-entry for non-payment of rent. The lease was registered with a good leasehold title in the Land Registry on May 29, 1952.

On January 27, 1953, the defendant Marche assigned the lease to the plaintiff company, Chelsea Estates Investment Trust Co. Ld., and one Edward Anthony Coles was joined as a guarantor for the performance by the plaintiffs of the covenants in the lease, Coles being the principal shareholder in the plaintiff company. By a legal charge also dated January 27, 1953, the plaintiffs charged the premises to Marche to secure repayment of the sum of £4,500 together with interest, the principal being repayable by instalments. The security was a charge by way of legal charge of the demised premises. Both the assignment and the legal charge were registered in the Land Registry on March 11, 1953. The charge included not only the demised premises, but certain fixtures and fittings and the goodwill of the business of an hotel carried on thereon, but claims in the pleadings with regard to the fixtures and fittings were not proceeded with, as it was agreed that there was a difficulty in determining that question in the absence of the landlord, the Prudential Assurance Company Ld.

The plaintiffs entered into possession of the premises before the date of the execution of the assignment to them, but they never paid any rent to the landlord, and on May 13, 1953, the Prudential Assurance Company Ld. issued a writ in the Queen's Bench Division against the plaintiffs and the guarantor, Coles, claiming possession of the demised premises and rent. On May 29, 1953, the Prudential obtained a judgment for possession in default of appearance, but they never went into possession.

The defendant mortgagee, Marche, had issued a writ in the Chancery Division against the plaintiffs and against the guarantor on May 20, 1953, claiming payment of the principal amount due because the plaintiffs had paid neither rent nor interest on the mortgage. Judgment in that action was given against the guarantor Coles only, on July 17, 1953.

In the first action, that by the Prudential, in which judgment for possession had been given, the plaintiffs applied under section 146 (2) of the Law of Property Act, 1925,[1] for relief from forfeiture of the lease, and on March 23, 1954, an order was made, by which the plaintiffs were to be allowed relief from forfeiture on the terms of paying all the costs incurred, all the arrears of rent, on making some repair or improvement to the demised premises and on certain other terms, not here relevant, as between the plaintiffs and the defendant mortgagee; but it was provided that, if those terms were not complied with within the limit of seven days set on the payment of the arrears of rent, the application for relief from forfeiture was to be dismissed with costs.

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[1] Law of Property Act, 1925, s. 146: "(2) Where a lessor is proceeding, by action or otherwise, to "enforce . . . a right of re-entry or "forfeiture, the lessee may, in the "lessor's action, if any, or in any "action brought by himself, apply to "the court for relief; and the court

The plaintiffs did not comply with that order, and it was common ground that the application was therefore dismissed. Peter Marche as mortgagee then applied for relief from forfeiture under section 146 (4) of the Law of Property Act, 1925. He was a chargee by way of legal mortgage, and by the recent decision in *Grand Junction Co. Ld.* v. *Bates*[2] he was in as good a position as a lessee to seek relief from forfeiture, because under section 87 of the Act he was to be treated as being an under-lessee for one day less than the head lease.

On that application an order was made on April 29, 1954, in these terms: "The court doth pursuant to section 146 of the "Law of Property Act, 1925, order that the two messuages and "premises situate and known as Nos. 35 and 36, Princes Square, "Bayswater, in the county of London, comprised in a lease "dated April 18, 1952, and made between the plaintiffs [in that "action, the Prudential] of the one part and the applicant Peter "Marche of the other part do vest in the said applicant for all "the residue of the term expiring on June 24, 2010, granted by

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"may grant or refuse relief, as the "court . . . thinks fit; and in case "of relief may grant it on such "terms, if any . . . as the court, "in the circumstances of each case, "thinks fit. . . . (4) Where a lessor "is proceeding by action or otherwise "to enforce a right of re-entry or "forfeiture under any covenant . . . "in a lease, or for non-payment of "rent, the court may, on application "by any person claiming as under-"lessee any estate or interest in the "property comprised in the lease or "any part thereof, either in the "lessor's action (if any) or in any "action brought by such person for "that purpose, make an order vesting, "for the whole term of the lease or "any less term, the property com-"prised in the lease or any part "thereof in any person entitled as "under-lessee to any estate or interest "in such property upon such condi-"tions . . . as the court in the cir-"cumstances of each case may think "fit, but in no case shall any such "under-lessee be entitled to require a "lease to be granted to him for any "longer term than he had under his "original sub-lease."

[2] [1954] 2 Q.B. 160; [1954] 2 All E.R. 385.

"the said lease," and then there was an order on the present plaintiffs to pay costs and the arrears of rent in the usual way.

Upon that the plaintiffs appealed to Pearson J., who dismissed their appeal on May 11, 1954. The plaintiffs delivered up possession to the mortgagee on July 10, 1954, pursuant to an order of June 17, 1954, so that the present position, admitted upon the pleadings, was that the mortgagee was now in possession.

The question then arose whether the mortgagee held the lease granted to him as part of his mortgage security, or whether he was in the position to treat himself as absolute owner of the leasehold premises freed from any rights on the part of the plaintiffs under the mortgage of January 27, 1953. The mortgagee, however, treated the property as his own, and by a contract, dated October 4, 1954, he agreed as absolute owner to sell the property for a sum substantially in excess of the mortgage.

The plaintiffs began this action for redemption of the mortgage by writ dated August 9, 1954, in the first place against the mortgagee; but the second, third, fourth and fifth defendants, who had contracted with the mortgagee to purchase the property, were joined at a later stage by amendment.

On October 6, 1954. the Chief Land Registrar, after a contested hearing, at which the plaintiffs and the mortgagee were represented, made an order that the register be amended to give effect to the order of the Queen's Bench Division, the mortgagee being registered as the proprietor with a good leasehold title for a term created by the order; a caution was also entered to safeguard the interest of the plaintiffs pending the hearing of the action.

Ingress Bell Q.C. and *I. C. Duthie* for the plaintiffs. The plaintiffs claim that on payment of principal and interest they are entitled to redeem the mortgage; that is so whether the order of April 29 granting the mortgagee relief against forfeiture operated as an assignment of the existing lease or whether it created a new lease. On its terms the order constitutes an assignment of the existing lease, and the lease therefore still being in existence it must accordingly be subject to the mortgage. No covenants or conditions were put in the order, but the mortgagee can have no greater interest under the lease than the plaintiffs had, and he must be bound by the terms and conditions of it, which includes the mortgage term. [*Dendy* v. *Evans* [3] was referred to.]

[3] [1910] 1 K.B. 263.

Alternately, if the lease vested in the mortgagee under section 146 (4) of the Law of Property Act, 1925, that operates as a grant of a new lease: *Serjeant* v. *Nash, Field & Co.*[4] But the mortgagee is not entitled to hold that new lease for his own benefit; he holds it subject to the plaintiffs' right of redemption. The equity of redemption can only be extinguished in four ways: (1) foreclosure, (2) the Limitation Acts, (3) merger, and (4) sale under powers. [Reference was made to Fisher and Lightwood's Law of Mortgages, 7th ed., p. 419 et seq.] The only cases where relief against forfeiture was granted to mortgagees who had not foreclosed were those where the mortgagor had disclaimed any interest or had disappeared: *Humphreys* v. *Marten.*[5] [He also referred to *In re Burrell.*[6]]

Section 4 of the Conveyancing Act, 1892 (which is re-enacted in section 146 (4) of the Law of Property Act, 1925), allows the grant of relief against forfeiture to an under-lessee in cases where the court had no power to grant it to the lessee himself: *Wardens and Governors of Cholmeley School, Highgate* v. *Sewell.*[7] Under the Common Law Procedure Act, 1852, relief against forfeiture was only granted in the case of non-payment of rent, the lease being regarded as a security for payment of the rent. These statutory provisions were to compensate an under-lessee for the loss of his lease, not to give him any additional advantage.

Where a mortgagee obtains an interest or benefit through the mortgage he holds it for the benefit of the mortgagor: see *Rushworth's* case.[8] The new lease which is granted to the mortgagee is not a new estate, but something which is grafted on the old lease, subject to the same burdens as the old lease and accordingly subject to the equity of redemption: *Rakestraw* v. *Brewer,*[9] *In re Biss*[10] and *Nelson* v. *Hannam.*[11] Those cases do not cover the present case, but they establish the principle that where the mortgagee obtains a renewal of a lease by means of the mortgage he holds it for the benefit of the mortgagor, but where he obtains it by means of something outside the mortgage, he may or may not hold it for himself.

If the plaintiffs are not entitled to the equity of redemption the mortgagee cannot also have the money due under the mortgage because he has the property, that should be so on general equitable principles. If the court treats this as foreclosure absolute, then the mortgagee must be held to have chosen to take the property as his remedy.

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[4] [1903] 2 K.B. 304; 19 T.L.R. 510.

[5] [1905] 1 Ch. 739.

[6] (1869) L.R. 7 Eq. 399.

[7] [1894] 2 Q.B. 906; 10 T.L.R. 509.

[8] (1676) Freem.(Ch.) 12.

[9] (1728) 2 P.Wms. 510.

[10] [1903] 2 Ch. 40.

[11] [1943] Ch. 59; 59 T.L.R. 128; [1942] 2 All E.R. 680.

A mortgagee's rights are a security for his money, and if he has got his money he cannot get any more; the courts have always treated the relationship between mortgagor and mortgagee as one of security for the debt. If a mortgagee sells as beneficial owner after foreclosure absolute, he loses all his other rights. The court is thus by analogy asked to say that just as a mortgagee who forecloses and sells as beneficial owner loses all other rights, a mortgagee who has obtained relief from forfeiture by the grant of a new lease and who has sold as beneficial owner should be prevented from exercising his other remedies: see *Ellis & Co.'s Trustee* v. *Dixon-Johnson* [12]; *Lockhart* v. *Hardy* [13]; Fisher and Lightwood's Law of Mortgages, 7th ed., pp. 319 and 785.

Had the relief against forfeiture been granted to the original lessee, he would have had to renew his covenants under the lease, and a mortgagee who has approached the landlord and got the relief for himself must hold that engrafted interest subject to the terms of the lease, including the mortgage. The court has always jealously guarded the rights of a mortgagor and will not bar them casually. The mortgagee's interest is to get his money back and the property is only a security for that purpose. In asking for relief against forfeiture it should not be as a lessee who might be entitled to make a profit, but as the uneasy creditor who fears for the security for the mortgage debt.

Lionel Edwards Q.C., *J. L. Elson Rees* and *Ian Payne* for the first defendant, the mortgagee. The first issue is whether the order of April 29, 1954, has the effect of assigning the lease or of creating a new lease. The validity of the order cannot be questioned as it is an order of the court, and it must be a question of its construction. The only jurisdiction to make an order in favour of an underlessee or mortgagee arises under section 146 (4) of the Law of Property Act: this order must therefore have been made under that subsection. The subsection does not give the landlord power to vest the lease in the under-lessee or mortgagee or to assign it to him, but merely enables the landlord to grant a new lease to the under-lessee or mortgagee. That creates privity of contract between the landlord and the under-lessee which an assignment would not do. The terms of the new lease do not necessarily incorporate the terms of the old lease: *Ewart* v. *Fryer*.[14]

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[12] [1924] 1 Ch. 342; 40 T.L.R. 177. [13] (1846) 9 Beav. 349.

Were it said that on the construction of this order that it created an assignment and not a new lease, it would be saying that the court had made an order which it had no jurisdiction to make. The court would not so hold unless it were compelled to do so.

[He was stopped.]

On the assumption that this is a new lease, the question is whether the court will find that the mortgagee holds it absolutely or whether a court of equity will compel him to hold it subject to the equity of redemption. Examination of the facts shows that the mortgagee has not abused his position as mortgagee; the plaintiffs paid little interest, and they themselves had an order for relief against forfeiture which they lost because of their failure to fulfil the conditions. The mortgagee did not get his relief behind the back of the plaintiffs, the latter were present by their counsel when the order was made in favour of the mortgagee. In those circumstances it cannot be said that he intercepted the plaintiffs, and since the mortgagee was not in a fiduciary relationship to the plaintiffs he is entitled to hold the lease for himself absolutely: *In re Biss*[15]; *Nesbitt* v. *Tredennick*.[16]

The plaintiffs' right of relief against forfeiture determined before the new lease was created. This form of relief against forfeiture has been in operation for sixty years, and there has been no case where it has been held that a mortgagee who took a new lease held it subject to the old equity of redemption. If the plaintiffs be right that the old equity of redemption is not extinguished, it would go a long way to destroying the protection afforded to a mortgagee by section 146 (4), and *Grand Junction Co. Ld.* v. *Bates*[17] would probably have been differently decided, with great injustice in that case to the mortgagee.

It is not argued that in every case where the mortgagee obtains relief against forfeiture he holds it for himself, it may not be so in the case of a mortgagee in possession, but on the facts of this case, where the mortgagor has had every conceivable chance of obtaining relief, a constructive trust cannot arise in his favour.

D. A. Thomas, for the second, third, fourth and fifth defendants, purchasers of the lease from the mortgagee, did not argue the question whether or not the plaintiffs' rights as mortgagors were still in existence, but was only concerned to protect their rights under the contract of sale.

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[14] [1901] 1 Ch. 499, 512; 18 T.L.R. 590.

[15] [1903] 2 Ch. 40.

[16] (1808) 1 Ball & B. 29.

[17] [1954] 2 Q.B. 160; [1954] 2 All E.R. 385.

UPJOHN J. having stated the facts: The question which I have to determine is, first, does the mortgagee hold the demised premises free from the mortgage or as a substituted security? If he holds them free from the mortgage, cadit quaestio. If not, the question then arises: what are the rights and liabilities of the parties, having regard to the fact that the mortgagee has entered into a contract of sale with the second, third and fourth defendants?

The first point is put in two ways. It is said, first, that the order of April 29, 1954, operates as a re-assignment to the mortgagee of the lease previously vested in the plaintiffs, and, of course, if that be right, it is the same lease throughout and must necessarily, therefore, be subject to the mortgage. On the other hand, it is said that the order was not an assignment of the original lease, but that it created a new lease between the Prudential Assurance Company, as landlords, and the mortgagee as lessee.

The order is made pursuant to section 146 of the Law of Property Act, 1925, and subsection (4) of that section is the only subsection applicable to the case of an under-lessee. It is common ground that the proper way of giving effect to subsection (4) of section 146 is by creating a new term in the under-lessee; that is plain from the whole framework of the subsection, particularly the concluding words, "but in no case shall any such under-"lessee be entitled to require a lease to be granted to him for "any longer term than he had under his original sub-lease. . . ." That view is indeed confirmed by *Ewart* v. *Fryer*[1] and *Serjeant* v. *Nash, Field & Co.*[2] If the court had ordered the lease to be assigned, since there was no appeal, that would, I think, bind me, even if the order were made without jurisdiction. At all events one approaches the construction of the order with this in mind, that the proper way of granting relief to an under-lessee is by way of new lease rather than under-lease. The order is not happily expressed. In the first place, the term granted to the mortgagee was not a term for one day less than the original term, but the whole of the original term; he was entitled to no more than the term less one day, but he got the whole term. That is perhaps not very important; but it is also to be observed that nothing is said as to the terms on which the property is to be vested in him, but I think that the words "upon the terms and conditions of the lease" must be implied.

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[1] [1901] 1 Ch. 499; 18 T.L.R. 590.

[2] [1903] 2 K.B. 304; 19 T.L.R. 510.

Approaching this order in the manner I have mentioned, it is reasonably clear that the order did not operate as an assignment, but operated as a grant of a lease expiring on June 24, 2010, on the terms and conditions of the original lease, so that the mortgagee thereby again became in direct contractual relationship with the Prudential Assurance Company, the original lease having expired.

It seems to me, therefore, that the mortgagee must be treated as holding under a lease created by the order of April 29, 1954. The question then is whether he holds that new lease free from the mortgage or subject to it.

The law is not really in dispute. Where a lease which is mortgaged contains a right to renew it or an option to purchase the freehold reversion, and those rights or options are exercised by the mortgagee, it is quite clear that the renewed term or the freehold reversion is held by the mortgagee as part of his security. That was made clear by the Court of Appeal in *Nelson* v. *Hannam*,[3] where Lord Greene M.R. said this[4]: "The real truth, in my opinion, is that "a mortgagee who takes as part of his security an option to "purchase the freehold reversion on the lease included in the "security is in principle in the same position as the mortgagee "of a lease which contains an option to the lessee to renew. It "is established by a number of old authorities—and, indeed, at "this time of day no authority is required to establish it—that "where the mortgagee exercises the right of renewal he must "hold the renewed lease subject to the same equity of redemp-"tion as existed in relation to the original lease." That does not directly cover this case.

The general law is conveniently summed up in *In re Biss*,[5] which in fact was not concerned with mortgages, but with the renewal of a lease which formed part of a trust estate; but both Lord Collins M.R. and Romer L.J. considered the position of mortgagees.

Lord Collins said[6]: "But there is another class of cases in

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[3] [1943] Ch. 59; 59 T.L.R. 128; [1942] 2 All E.R. 680.

[4] [1943] Ch. 63.

[5] [1903] 2 Ch. 40.

[6] Ibid. 56.

"which, as it seems to me, there is no presumption of law, but "at most a rebuttable presumption of fact. In this class "apparently are mortgagees: *Rushworth's Case* [7]: joint tenants, "*Palmer* v. *Young* [8]: and partners, *Featherstonhaugh* v. *Fenwick*.[9] Prima facie, a mortgagee cannot renew for himself: he "cannot hold the accretion, any more than he can hold the term "itself, free from the right to redeem; the reason here is "analogous to that which governs the rights of tenants for life. "But in this case the presumption is apparently rebuttable; and "in *Nesbitt* v. *Tredennick* [10] Lord Manners held it was rebutted. "He said: 'Here no part of Nesbitt's conduct shows a contri"'vance, nor was he in possession: all that Nesbitt or Tredennick "'treated for, was a new lease, giving however full opportunity "'to the plaintiffs, to dispose of their interests or to renew if "'they were enabled so to do.'"

Romer L.J. said [11]: "I will next deal with the cases decided "as betweeen mortgagor and mortgagee. Each of these owes "a duty to the other in respect of the mortgaged property; and "in case of one being able, by virtue of his position, to obtain "a renewal of a mortgaged lease, there are obvious grounds why "it should be held against him, at any rate as a rule, that the "renewed lease should be treated as engrafted on the old and as "forming part of the mortgage security. In the case of a mort"gagee renewing, it was put as follows by the court in the case "of *Rakestraw* v. *Brewer* [12]: 'This additional term comes from "'the old root. and is of the same nature, subject to the same "'equity of redemption, else hardships might be brought upon "'mortgagors by the mortgagees getting such additional terms "'more easily, as being possessed of one not expired, and by "'that means worming out and oppressing a poor mortgagor.'"

In both those passages I think that the court was plainly dealing with the case where a mortgagee is able to renew not as of right, but where on the expiry of the old lease he, by virtue of his position, was or might be favourably placed to obtain a renewal from the landlord. As Lord Collins pointed out, however, where he is guilty of no contrivance, where he is not in possession and where, in the words of the old case of *Nesbitt* v. *Tredennick*,[13] he has not "amused" the mortgagor, "with hopes of his "redeeming," the mortgagee may be in a position to keep the new lease for himself; but that prima facie the mortgagee holds a new term as part of the old stock and subject to the mortgage.

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[7] (1676) Freem.(Ch.) 12.
[8] (1684) 1 Vern. 276 [277].
[9] (1810) 17 Ves. 298.
[10] (1808) 1 Ball & B. 29.
[11] [1903] 2 Ch. 62.
[12] (1728) 2 P.Wms. 510, 513.
[13] 1 Ball & B. 29.

Mr. Edwards has forcibly pointed out here that the plaintiffs have never paid any rent or any interest. They did at one time repay £750 of capital, but that is all that they have ever done in the way of payment under the lease and under the mortgage. They have had every opportunity of getting relief from forfeiture, and an order was made in their favour which could not be described in any way as unduly onerous, but they entirely failed to take advantage of that order. The mortgagee only obtained an order vesting the premises in him when the plaintiffs had wholly failed to take advantage of the order which they had obtained and it stood dismissed. It is admitted by the plaintiffs here that there is no question of the mortgagee having in any way abused his position or gone behind their backs. He behaved with perfect propriety and gave every opportunity to the plaintiffs themselves to get relief, and it was only when they failed that he took steps. He was not, of course, at the relevant time in possession of the mortgaged premises.

Mr. Edwards submits that the matter really rests on conscience, and that there is nothing whatever unconscionable in the mortgagee claiming the lease for his own. He claimed it in the presence of the plaintiffs, who were parties to his application, and, indeed, they appealed to the judge in chambers. They had had their chance, and then it was open to the mortgagee to step in and get a lease. It is said therefore with much force that the lease granted to the mortgagee ought to be treated as his own and not subject to the mortgage.

Whichever be the right view, certain anomalies, it seems to me, necessarily arise. If this new lease is not treated as part of the mortgage security, then I can see no reason in law why the mortgagee should not keep his new lease and at the same time sue the plaintiffs for the whole mortgage money under the covenants in the mortgage; for the position in law can be no different from that where the leasehold security has expired not by forfeiture, but by effluxion of time; that would seem to be a hardship on the plaintiffs. On the other hand, if the plaintiffs are right the anomalies certainly arise the other way. It is clear that the mortgagee receiving a new lease will remain liable on the covenants throughout the residue of the term, although the mortgage might be redeemed by the mortgagor next day. If there were an application for relief by a mortgagor, who was found to be quite unsuitable, because, for instance, he had used the demised premises as a brothel and relief was refused on that ground, but a new lease was granted to the mortgagee, as happened in the recent case before me of *Grand Junction Co. Ld.* v. *Bates*,[14] then, if the plaintiffs are right, if the mortgagor is in a position to redeem the mortgage, the landlord, who has been compelled to grant a new lease to the mortgagee, finds that the wholly unsuitable mortgagor is again in possession of the demised premises. That would seem strange. Hardship arises whichever way one looks at the matter, but the question of hardship seldom affords a true guide as to the proper principles to be applied.

I think that the matter should be looked at in this way. At common law if a lease was forfeited, that necessarily brought down with it all under-leases and much hardship to innocent persons was thereby caused; and it had been the practice of the Court of Chancery for many years to relieve against forfeiture for non-payment of rent, because the lease was looked upon as mere security for the payment of rent, and the Conveyancing Act, 1892, carried that principle further. I need not review the history of that Act, which is too well known to require it. The statutory provisions are now embodied in section 146 (4), the whole object of that section being to relieve from the hardship of the common law.

Looked at in that way, it seems to me that in principle, where the lessee defaults and the under-lessee comes forward, he does so to protect his position and to protect what in substance is his under-lease. It is true that he gets a new lease, but the whole essence of the matter is that he is to be protected in substance in respect of his under-lease, as Vaughan Williams L.J. said in *Ewart* v. *Fryer*[15]: "Now, in my judgment, section 4 "of the Conveyancing Act, 1892, was intended to protect a "vested interest which the legislature thought ought to be "protected. At law there is no privity between the underlessee "and the original lessor. The object of the statute was that "protection should be given to the underlessee." So, here, it seems to me that the legislature intends that the mortgagee shall be protected, and protects him by giving him a new lease, but it must necessarily be a lease substituted for the old; and, therefore, where there is a mortgagor, it must in my judgment be a substituted security.

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[14] [1954] 2 Q.B. 160; [1954] 2 All E.R. 385.

[15] [1901] 1 Ch. 499, 512.

Another way of regarding the matter is this. The position is closely analogous to cases of the right to renew a lease or to purchase a freehold reversion. Here, of course, there is no absolute and unqualified right; but everyone entering into an under-lease knows that there will be available to him the right of applying to the court to exercise a discretion in his favour on suitable terms where the lessee defaults. Accordingly, in my judgment, the lease created by the order of April 29, 1954, must be treated as subject to the mortgage.

That gives rise to the second point. As I have already mentioned, on October 4, 1954, the mortgagee entered into a contract to sell the demised premises to the other defendants, and he contracted confessedly not in the exercise of his power of sale, which he could have done, notwithstanding the issue of the writ, but as absolute owner, maintaining perfectly fairly, though in my judgment wrongly, that he was the absolute owner of the new lease granted to him. Mr. Edwards fairly admitted that, if he were wrong on the main point, as I have now held him to be, he could not resist an order for an account of the proceeds of sale, having sold at a substantial profit. There was some discussion, and it seemed to me possible that there might be some ground on which to restrain him from proceeding with this particular contract, because he had entered into it not rightfully in exercise of his power of sale but wrongfully purporting to deny the plaintiffs' title and to exercise his rights as absolute owner. That question, however, does not call for decision, for, when Mr. Ingress Bell discussed his amended pleadings, he plainly elected not to ask for any injunction to restrain the first defendant from proceeding with his contract.

I shall make a declaration that the substituted lease is subject to the mortgage without prejudice to the question whether there is, having regard to the contract, a subsisting right to redeem, and the register must be rectified in the appropriate manner.

Judgment for the plaintiffs accordingly.

Solicitors: *Mark Lemon; Scadding & Bodkin; H. E. Goodrich.*

I. G. R. M.

MILLS AND ANOTHER *v.* AVON AND DORSET RIVER BOARD.

1955
Jan. 21, 25.

Vaisey J.

[1954 M. 1314.]

Fishery—Salmon—Licence—General—Statutory annual general licences from fishery board to fish—Commercialization of fishing by certain owners—Withholding of general licences from all owners—Whether river board entitled indiscriminately to withhold general licences—Salmon and Freshwater Fisheries Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 16), *ss.* 61, 93 (2)—*Hampshire Rivers Fisheries Provisional Order Confirmation Act,* 1922 (12 *&* 13 *Geo.* 5, *c. cviii*), *Sch.*: *Hampshire Rivers Fisheries Provisional Order,* 1922, *cl.* 17.

The plaintiffs were the owners of two several fisheries on the Hampshire Avon. For many years general licences to fish those fisheries had been issued by the local fishery board, first under the Salmon Fishery Act, 1865, and later under section 61 of the Salmon and Freshwater Fisheries Act, 1923, as modified under section 93 (2) thereof by clause 17 of the Hampshire Rivers Fisheries Provisional Order, 1922. In 1953 the board decided not to issue general licences for 1954, on the ground that certain owners of fisheries within their area had commercialized their fishing, with the result that the issue of general licences caused the board substantial losses. The plaintiffs, and certain other owners within the area of the board, had not commercialized their fishing, and by this summons the plaintiffs asked for a declaration that they were entitled as of right to the issue to one or both of them of a general licence:—

Held, in deciding that, on the true construction of section 61 as modified by clause 17 of the order, they were so entitled: (1) that a fishery owner was entitled to a general licence under those provisions unless the fishery board could adduce a good reason for withholding it referable to the applicant himself, or to the conditions under which his fishery was being used; (2) that the withholding of a general licence from the plaintiffs for no better reason than that persons unconnected with them had been acting in a manner of which the defendants disapproved, and the wholesale and indiscriminate withholding of general licences for 1954, were unjustified; (3) that, on the true construction of clause 17 of the order, the appropriate sum to be paid for a general licence was to be agreed or determined according to the circumstances of each case.

Semble, losses arising from commercialization or other particular uses of fisheries ought to be recouped, not by the wholesale and indiscriminate withholding of the issue of general licences, which was inequitable, but by charging those responsible for the losses appropriate higher fees for their general licences.

ADJOURNED SUMMONS.

The plaintiffs were father and son. In 1908 the first plaintiff became tenant for life of the Bisterne Estates, which included the Bisterne Fishery and the Winkton Fishery, both on the Hampshire Avon. For at least 30 years before 1954, general licences to fish in respect of each fishery were issued, under section 34 of the Salmon Fishery Act, 1865, and then under section 61 of the Salmon and Freshwater Fisheries Act, 1923, as modified under section 93 (2) by the Hampshire Rivers Fisheries Provisional Order, 1922,[1] to the first plaintiff, except that during the currency of a lease of the Winkton Fishery granted by him from 1918 to January 31, 1940, a general licence to fish in respect of the Winkton Fishery was issued to the lessee under that lease. In 1953 the defendants, the Avon and Dorset River Board, decided not to issue general licences for 1954, on the grounds that a majority of the owners of exclusive rights of fishing in the defendants' area had commercialized their fishing, so that the defendants lost considerably if general licences were granted. In 1954 the first plaintiff surrendered his life interest in the Bisterne Estates to the second plaintiff, to whom he paid a lump sum for the exclusive licence to fish both fisheries for the rest of the salmon and trout fishing season of 1954. The second plaintiff intended to take over thereafter and to apply to the defendants for general licences for 1955. Neither the plaintiffs nor certain other owners within the defendants' area had commercialized their fishing: and by this summons, taken out on April 6, 1954, the plaintiffs asked, inter alia, for a declaration that, on the true construction of section 61 of the Act of 1923 as modified under section 93 (2) by clause 17 of the Order of 1922, they, as the persons entitled for the time being to an exclusive right of fishing for salmon and trout in both fisheries, were entitled as of right to the issue to one or both of them of a general licence within the meaning of section 61, rule (*g*), of the Act to fish for salmon or trout with rod and line subject to such conditions as might be agreed or in default of agreement as might be determined by the Minister of Agriculture and Fisheries.

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[1] Salmon and Freshwater Fisheries Act, 1923, s. 61: "Every "fishery board shall grant licences "to fish for salmon or trout with "any instruments which may be "lawfully used for the purpose, and "such licences shall be issued and "shall have effect in accordance with "the following rules:—(*a*) Licences "shall be granted on payment of "such licence duties as the fishery "board, with the approval of the "Minister, may from time to time "determine, or, in the case of any "instrument for which a licence duty "has not been determined and approved and which may be lawfully "used in the district on payment of "a licence duty of twenty shillings ". . . (*c*) Subject to the provisions "of this Part of this Act with "respect to the limitation of the "number of licences, every person "demanding a licence, and tendering to the person appointed by the "fishery board to distribute licences "the amount of licence duty payable "under this Act in respect of that "licence, shall, unless disqualified "for holding a licence in manner "hereinafter appearing, be entitled "to receive that licence without any "question or objection whatsoever. ". . . (*g*) Any person or association "of persons for the time being entitled to an exclusive right of fishing for salmon or trout in any "waters may, on application to the "fishery board, obtain a general "licence subject to such conditions "as the fishery board and the "licensee may agree or in default of "agreement as may be determined "by the Minister; and such general "licence shall enable the licensee or "any person authorized by the "licensee in writing under his hand, "or when granted to an association "of persons any member of the "association authorized in writing "by the secretary of the association, "without any other licence, to fish "for salmon or trout in any legal "manner in those waters, but shall "not be of any validity beyond the "limits to which it refers." Rule (*h*) provides: "There shall be paid for a "general licence such sum as the "fishery board and the person or "association of persons entitled to the "licence may from time to time agree, "with the approval of the Minister, "having regard to the extent and "productiveness of the fishery, and "to the nature of the instruments "used and to the conditions (if any) "attached to the licence."

Hampshire Rivers Fisheries Provisional Order, 1922 (scheduled to the Hampshire Rivers Fisheries Provisional Order Confirmation Act, 1922), cl. 17: "There shall be paid "for a general licence such sum as "shall be agreed by the Fishery Board "and the person entitled to the "licence and be approved by the "Minister or as shall on the application of either party be determined "by the Minister having regard to "the extent and productiveness of "the fishery and to any conditions "attached to the licence with respect "to the nature of the instruments or "devices to be used for catching fish "or otherwise which shall be agreed "upon by the said parties or in "default of agreement be imposed "by the Minister."

Dingle Foot Q.C. and *Joseph Dean* for the plaintiffs. Any fishery owner in the defendants' area who applies to the defendants is entitled to a licence. The court is here dealing with fishery owners who, in the absence of legislation providing otherwise, would be entitled to fish as they choose. It would be a strange result if, on the true construction of the Act of 1923, the legislature had taken away the right of those owners to fish in their own fisheries. There is a presumption that that right was not intended to be taken away. [Reference was made to section 33 of the Salmon Fishery Act, 1865, which provided for the issue of licences at a fixed price in any fishery district subject to the control of a board, and to section 34, which prescribed rules with respect to licences granted in pursuance of the Act.] In section 61 (*a*) of the Act of 1923 the word "shall" in the expression "licences shall be granted" is mandatory. There is no provision in the Act which enables the defendants to contend that private owners can be prevented from obtaining general licences. There is a distinction between public and private waters. Section 61 (*g*) provides, not that the owner of a fishery may "apply for" a general licence, but that he may "on application to the fishery "board obtain" a general licence. The defendants, in refusing to issue general licences for 1954, have, in effect, wiped out the class of general licences and, if the declaration for which the plaintiffs ask be not made, will be able to continue that refusal year after year and so deprive in perpetuity the owners of fisheries of their right to general licences.

[Vaisey J. If a fishery were put up for sale its value would be seriously depreciated were it known that the fishery board would not grant a general licence.]

That would be so; and, even had the defendants a discretion to refuse a general licence, which the plaintiffs contend that they have not, that discretion could not properly be exercised in the present case.

Norman J. Skelhorn Q.C. and *Owen Thomas* (*Raymond Stock* with them) for the defendants. The defendants have a discretion in this matter and it has been properly exercised in this case. If the provision in section 61 that general licences shall be issued is mandatory then it is conceded that the defendants are bound by it. If it is not, they are not bound to issue them, whatever criticisms may be directed against their policy in refusing so to do. It is for the defendants to decide what is the best way of carrying out their functions, one of which —see section 54—is to improve the fisheries of the district. They found that, in practice, a large number of general licensees were using their licences for commercial purposes, i.e., that they were sub-licensing for a consideration. It is not contended that they were doing so otherwise than legitimately; but they were thus obtaining revenue which ought really to belong to the defendants.

On the true construction of section 61 the words used with regard to general licences are only directory, not mandatory. The opening words of the section are to be construed as directory. True, rule (*c*) is mandatory, but only in respect of the cases to which it applies: it has no application to general licences.

It is conceded that section 61 (*g*) is modified by clause 17 of the Order of 1922 and that that Order is kept alive by section 93 (2). [Reference was also made to section 38, which sets out the matters for which an Order made under Part IV of the Act may provide.] The Order, however, applies to only part of the defendants' area, and the Act cannot be construed by reference to the Order. If, which the defendants do not admit, there is under section 61 a statutory duty to issue general licences, it exists quite apart from the modification made by the Order. The correct procedure is to construe section 61 alone; and, so construed, rule (*h*) is not mandatory, with the result that the defendants are not bound to issue general licences.

Cur. adv. vult.

Jan. 25. VAISEY J. The exact nature of the plaintiffs' interests need not be specified, and for the purposes of this case the plaintiffs, John Digby Mills and his son John Micklethwaite Mills, may be regarded as the owners of two several fisheries on the Hampshire Avon, that is to say, the Bisterne Fishery in the Parish of Ringwood, and the Winkton Fishery in the Parish of Christchurch. For many years before 1954, that is down to and including 1953, general licences had been issued in respect of each of these fisheries, formerly under section 34 (4) of the Salmon Fishery Act, 1865, and afterwards under section 61 of the Salmon and Freshwater Fisheries Act, 1923, as modified under section 93 (2) thereof by the Hampshire Rivers Fisheries Provisional Order, 1922. Such licences were issued before 1950 by the Hampshire Rivers Board of Conservators, whose functions were thereafter taken over by, and are now vested in, the defendants, the Avon and Dorset River Board.

Late in 1953 the defendant board told the plaintiffs of their decision not to issue any general licences for the year 1954, to which decision they adhered. The question raised in this case is whether the decision was justified.

The plaintiffs duly applied for general licences in respect of both their fisheries for 1954, and tendered the appropriate sums fixed by the Minister of Agriculture and Fisheries under section 61, that is to say, £50 in respect of the Bisterne Fishery and £20 in respect of the Winkton Fishery. I am told that my decision in this case will cover the case of the owners of two other fisheries on the same river, Lord Normanton as owner of the Somerley Fishery, and Lord Manners as owner of the Avon Tyrrell Fishery. Each of them applied for and was refused a general licence in respect of his fishery for 1954.

It appears that there are some 20 other cases in which general licences in respect of fisheries on the said river were granted in 1953 and withheld in 1954, and all the other persons to whom and from whom such licences were granted and withheld have acquiesced in the defendants' refusal to give them general licences for 1954.

The reason for the defendants' change of policy is explained by their clerk in these words: "The majority of the present "owners of exclusive rights of fishing in the board's area have "commercialized their fishing. If, in such cases, a general "licence is issued, it covers any number of persons who, whether "for a consideration or not, are permitted to fish by the owners "of the fishery, and general licences are, therefore, no longer "confined in such cases to private guests of the owners of the "fishery. If no general licence is issued, each of the persons "who fish the waters where there is an exclusive right of fishing "has to obtain from the defendant board a separate salmon, "trout or coarse fishing licence. A grant of general licences, "therefore, now causes a substantial loss of revenue to the "board."

It seems rather strange to me that the plaintiffs, who have not commercialized their fisheries, should be penalized by the action of the other fishery owners in having done so. And the same observation may, perhaps, be applicable also to the cases of Lord Normanton and Lord Manners. Surely, any loss arising from commercialization or other particular uses of fisheries ought not to be recouped in such a rough and ready way, but ought to be made to fall upon those who are responsible for it and not on the general body of owners of fisheries? To withhold the issue of general licences in a wholesale and indiscriminate manner strikes me as being very inequitable, and I cannot understand why an owner, who, by commercializing or otherwise, deprives the defendant board of income which they would otherwise receive, should not be charged an appropriate higher fee for a general licence, instead of having his general licence refused altogether. Still less can I understand why what I may call an innocent owner should be penalized, and the conclusion I have reached in this case is that a fishery owner is entitled to a general licence unless the board can adduce some good reason for withholding it referable to the applicant himself, or to the conditions under which his own fishery is being made use of. The withholding of a general licence from the plaintiffs for no better reason than that other persons unconnected with them have been acting in a manner of which the defendant board disapproves is, in my judgment, unwarranted. The wholesale and indiscriminate withholding of general licences for the year 1954 was, in my judgment, unjustified.

1955

MILLS
v.
AVON AND DORSET RIVER BOARD.

Vaisey J.

[His Lordship referred to section 61 of the Act of 1923, read rule (*a*) and (*c*), and continued:] I pause there to observe that this reference to "without any question or objection" appears also in the earlier Act, and is, in my judgment, somewhat strange. [He read rule (*g*) and continued:] It seems to me that under rules (*g*) and (*h*) there is ample authority for the defendants, with the assent and concurrence of the Minister, to make appropriate conditions, and to fix appropriate fees, in order to differentiate in a fair manner and not in the indiscriminate manner which a total withdrawal of the licence would seem to involve between the holders of the various fisheries.

By section 93 (2) of the Act the Provisional Order to which I have already referred must be treated as incorporated in the Act. [His Lordship read clause 17 of the Order, and continued:] I think that that clause makes it clear that the fixing of the appropriate sum to be paid is a matter to be decided as between the defendant board and the owners of the fisheries according to the circumstances of each case. I cannot for myself see (and I am not instructed as to the practice which has been adopted) that this matter is not one which should be dealt with not, as I have said, in the rough and ready manner which a total withdrawal of general licences would involve, but in what I may call a human and reasonable and appropriate manner in regard to each particular case.

Such being my view, the order which I propose to make is as follows. I shall declare that "on the true construction of "section 61 of the Salmon and Freshwater Fisheries Act, 1923, "as modified under section 93 (2) thereof by clause 17 of the "Hampshire Rivers Fisheries Provisional Order, 1922, the plain-"tiffs as the persons for the time being entitled to the exclusive "rights of fishing for salmon and trout in the two fisheries in "the River Avon in Hampshire known as the Bisterne Fishery "and the Winkton Fishery respectively are entitled as of right "to the issue to one or both of them of a general licence within "the meaning of section 61, rule (*g*), of the said Act to fish for "salmon or trout with rod and line subject to such conditions as "may be agreed or in default of agreement as may be deter-"mined by the Minister of Agriculture and Fisheries having "regard to the circumstances of the particular case, but without "prejudice"—I think it is right that I should add these words—"to the right of the defendant board to withhold such general "licence in the event of any abuse or misuse or threatened abuse "or misuse of the privileges conferred or intended to be conferred "thereby."

And as the withholding of licences for 1954 appears to me not to have been justified, I will order the defendant board to pay the plaintiffs' costs as between party and party.

Order accordingly.

Solicitors: *R. Graham Page, for Nevill & Stuart, Ringwood; Vizard, Oldham, Crowder & Cash, for D. W. Treadgold, Bournemouth.*

K. R. A. H.

C. A.

1955
Jan. 25, 26.

Evershed M.R.,
Jenkins and
Hodson L.JJ.

In re BURTON'S SETTLEMENT TRUSTS. PUBLIC TRUSTEE *v.* MONTEFIORE.

[1954 B. 2349.]

Settlement—Hancock v. *Watson, rule in—Accruer clause—Trust fund for two daughters of settlor with gifts over in favour of issue—Direction to treat trust fund as divided—Direction to appropriate moieties as daughters' shares—Share of deceased daughter to accrue to share of survivor—Death of daughters unmarried—No gift over on failure of issue—Rule applicable.*

By a settlement dated April 10, 1919, a settlor directed trustees to stand possessed of a trust fund on trust (clause 2) "to divide the "trust fund, or without actual division to treat the same as divided "into two parts and to appropriate one of such parts as the share "of" each of his two daughters. It was further provided that the share of each daughter should not vest absolutely in her, but should be retained by the trustees on trust during the life of such daughter to pay the income of such share to her and after her death on trust (as to both capital and future income) for the issue of such daughter as in the settlement mentioned. It was also provided that if the trusts concerning the share of either daughter should fail, such share should "accrue by way of addition to the share of" the other daughter, and should be held on the trusts of her original share or as near thereto as circumstances would admit.

There was no gift over in the event, which happened, of both daughters dying without issue.

Roxburgh J. held that the rule in *Hancock* v. *Watson* [1902] A.C. 14 did not apply and that on the death of the last daughter to die there was a resulting trust to the settlor:—

Held, that clause 2 of the settlement, when read together with the other clauses of the settlement, made absolute gifts to the two daughters through the medium of the direction to divide the fund, or to treat it as divided, into two equal parts and to appropriate one part to each daughter; that such direction was not a mere administrative direction and, accordingly, the rule in *Hancock* v. *Watson* [1902] A.C. 14 applied and there was no resulting trust for the settlor but the original absolute gift remained and operated in favour of the estates of the two daughters or possibly of the survivor of them.

Attorney-General v. *Lloyds Bank Ld.* [1935] A.C. 382 considered.

Decision of Roxburgh J., ante, p. 60; [1954] 3 All E.R. 231 reversed.

APPEAL from Roxburgh J.[1]

By an indenture of settlement dated April 10, 1919, and made between Arthur Burton as settlor of the one part and himself and another as trustees of the other part, it was recited: "Whereas the settlor being desirous of making some provision "for the maintenance education and benefit of his daughters "Audrey Evelyn Burton and Ida Marion Burton respectively "has transferred the investments mentioned in the schedule "hereto into the joint names of the trustees to be held by "them irrevocably upon the trusts hereinafter declared con-"cerning the same." The settlement provided by clause 2: "The trustees shall stand possessed of the investments men-"tioned in the schedule hereto and the investments for the time "being representing the same (hereinafter called the 'trust "'fund') and of the annual income thereof upon trust to divide "the trust fund or without actual division to treat the same as "divided into two equal parts and to appropriate one of such parts "as the share of each of them the said two daughters of the settlor "namely the said Audrey Evelyn Burton and Ida Marion Burton "respectively." Clause 3: "The share of the trust fund of each "of the said two daughters of the settlor shall not vest absolutely "in such daughter but shall be retained by the trustees upon the "trusts following: (i) During the life of such daughter the trustees "shall pay the income of such share to her and so that during "coverture the same shall be without power of anticipation. "(ii) During the minority of such daughter the trustees shall "apply the whole or such part as they in their discretion shall "think fit of the income of such share for or towards her main-"tenance education or benefit whether there is any other fund "applicable or any person bound by law to provide for such "maintenance or education or not and may pay the same to the

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[1] Ante, p. 60; [1954] 3 All E.R. 231.

C. A.
1955

BURTON'S SETTLEMENT TRUSTS, *In re.* PUBLIC TRUSTEE *v.* MONTEFIORE.

"parents or a parent or to the guardian or guardians of such "daughter for the purpose aforesaid without seeing to the "application thereof or after such daughter attains the age of "eighteen years may pay the same to her for the purpose of "defraying her dress and travelling expenses without seeing to "the application thereof and her receipt therefor shall be a "sufficient discharge to the trustee. And the trustees shall invest "the surplus income if any of such share in any investments "hereby authorized in augmentation of the capital of such share. "(iii) After the death of such daughter the trustees shall hold such "share and the future income thereof in trust for all or such one "or more exclusively of the others or other of the children or "remoter issue of such daughter in such shares if more than one "and in such manner in all respects as such daughter shall by "any deed or deeds revocable or irrevocable or by will or codicil "appoint. And in default of and subject to any such appointment in trust for all or any the children or child of such "daughter who being male attain the age of twenty-one years or "being female attain that age or marry and if more than one in "equal shares provided that no child of such daughter who or "whose issue shall take any part of the share of such daughter "under any appointment by virtue of any power herein contained "shall in default of appointment to the contrary be entitled to "any share of the unappointed part of the share of such "daughter without bringing the share or shares appointed to him "or her or to his or her issue into hotchpot and accounting for "the same accordingly." Clause 4: "If the trusts hereinbefore "declared concerning the share of either such daughter shall fail "then subject to the trusts powers and provisions herein declared "and contained and to the powers by law vested in the trustees "concerning the same and to every or any exercise of such "respective powers such shares shall go and accrue by way of "addition to the share of such other daughter and shall be "held upon the trusts and subject to the powers and provisions "herein declared and contained concerning her original share or "as near thereto as circumstances will admit." Clause 5: "The "trustees may at any time or times raise any part or parts not "exceeding in the whole one moiety of the share of either such "daughter or of the expectant share of any child or remoter "issue of such daughter (but with her consent in writing during "her lifetime) in the trust fund and may pay or apply the same "for his or her advancement or benefit in such manner as the "trustees shall think fit."

C. A.

1955

BURTON'S SETTLEMENT TRUSTS, *In re.* PUBLIC TRUSTEE *v.* MONTEFIORE.

The settlor's daughter Audrey died on August 31, 1927, a spinster, having by her will left all her estate to her sister Ida. The settlor died on July 12, 1932. His daughter Ida died on September 25, 1952, a spinster, and on her death the question arose as to how the trust fund was distributable.

A summons was taken out by the Public Trustee (the present trustee of the settlement) to determine whether, in the event which had happened of the death without issue of the two daughters of the settlor, the fund was held: (a) on trust in equal moieties for the respective personal representatives of the two daughters; or (b) on trust (as to the entirety) for the personal representative of Ida Marion Burton, the survivor of the beneficiaries; or (c) on a resulting trust for the personal representative of the settlor, or (d) on or for some other and what trusts or interests.

Roxburgh J. held that the rule in *Hancock* v. *Watson*[2] did not apply and that there was a resulting trust for the settlor's personal representative.

The legal personal representatives of the daughters appealed.

Raymond Jennings Q.C. and *A. J. Belsham* for the appellants. The question is whether, by reason of the death of both of the settlor's daughters without issue, there is a resulting trust for the settlor's estate or whether the settled funds are held in trust for the estates of the two daughters or of the survivor of them. Since the daughter first to die left all her property to the surviving daughter, it does not in fact matter whether the trust fund is divisible equally between their respective estates or whether it is held on trust for the survivor. It is submitted that this case does not fall within the principle of *In re Litt.*[3] If clause 2 of the settlement stood alone, without any subsequent engrafted trusts, it would confer absolute interests on each daughter in her share of the settled fund. If that is right, nothing can take away that absolute initial gift. If there be any ambiguity in clause 2, it is removed by clause 3, which shows an intention to cut down what was an absolute interest to something which is not absolute. The accruer provisions in clause 4 are not, as in *In re Litt,*[3] to the other daughter but to "the share of such other daughter." The trusts are similar to those considered by Jenkins J. in *In re Walter's Will's*

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[2] [1902] A.C. 14.

[3] [1946] Ch. 154; 62 T.L.R. 303; [1946] 1 All E.R. 314.

C. A.
1955

BURTON'S SETTLEMENT TRUSTS, *In re.* PUBLIC TRUSTEE *v.* MONTEFIORE.

Trusts,[4] where the point now under consideration was not in terms decided. The rule in *Hancock* v. *Watson*[5] applies where there is an initial absolute gift. *Attorney-General* v. *Lloyds Bank Ld.*[6] shows that the fact that there is an accruer clause will not prevent the rule applying to the initial shares when the surviving life tenant dies. It appears from the decisions in *In re Gatti's Voluntary Settlement*[7] and *In re Hatch*[8] that a trust to divide is apt to confer an absolute interest. There is no distinction between a trust to divide and appropriate the share of a daughter and a trust to appropriate "to a daughter." [Reference was also made to *In re Payne*.[9]]

R. W. Goff Q.C. and *Ian G. Campbell* for the respondent. It is not agreed that clause 2 of the settlement should be read first in isolation, and that, if so read it confers absolute interests, then the rule in *Hancock* v. *Watson*[10] must apply. That authority shows that the settlement must be read as a whole, and so read, it appears that clause 2 does not confer absolute interests but is merely administrative machinery: *In re Hatch*[11] is of assistance: no reasons were given for the decision in that case. *In re Payne*[12] is in favour of the respondent.

There is a distinction between appropriating to a share and to a person. Here the settlor did not intend to make gifts to his daughters but to establish a fund for their benefit. This appears from the recital. The settlement read as a whole contains no gift to the daughters; its whole tenor is against any transfer of the fund to the daughters. Clauses 1 and 2 of the settlement are merely administrative provisions conferring no beneficial interests on the daughters. In the events which have happened, there is a resulting trust for the settlor.

Raymond Jennings Q.C. in reply. The fact that the provisions in clause 2 are administrative in character does not mean that beneficial interests are not thereby contained. This is a question of construction. Reading clauses 2 and 3 together it is clear that the settlor intended to make absolute gifts in the first instance.

E. I. Goulding for the plaintiff.

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[4] [1949] Ch. 91; [1948] 2 All E.R. 955.

[5] [1902] A.C. 14.

[6] [1935] A.C. 382.

[7] 52 T.L.R. 674; [1936] 2 All E.R. 1489.

[8] [1948] Ch. 592; [1948] 2 All E.R. 288.

[9] [1927] 2 Ch. 1.

[10] [1902] A.C. 14.

[11] [1948] Ch. 592.

[12] [1927] 2 Ch. 1.

C. A.

1955

BURTON'S SETTLEMENT TRUSTS, *In re.* PUBLIC TRUSTEE *v.* MONTEFIORE.

EVERSHED M.R. In the well-known case of *Hancock* v. *Watson*[1] it was clearly laid down in the words of Lord Davey[2]: "if the terms of the gift are ambiguous, you may seek assistance "in construing it—in saying whether it is expressed as an absolute "gift or not—from the other parts of the will,"—it was a will there being discussed—"including the language of the engrafted "trusts. But when the court has once determined that the first "gift is in terms absolute,"—I take that to mean "is by or as "a consequence of its language absolute"—"then if it is a share "of residue (as in the present case) the next of kin are excluded "in any event."

That rule, so laid down with such high authority, has been regarded as well established ever since, and may be treated as part of the equipment of our law in determining problems such as have arisen in the present case, whether they emerge from a settlement or from the terms of a will. I am inclined to think that so well established has the rule become that Mr. Jennings may be right in saying that conveyancers, having the rule in mind, may deliberately use formulae in an opening paragraph of directions or dispositions so that the settlement or will, as the case may be, will be complete—that is, not fail altogether of effect—even though the specific trusts which are later elaborated, for one reason or another, wholly determine.

However that may be, the question in this, as in the many other cases which have come before the courts, is one of the construction of the particular document; and the question which has to be answered is: upon its true construction, is there here to be found a disposition, absolute in character, first made in favour of the two named persons in the settlement and only qualified to the extent of the detailed and more limited trusts which follow?

We are concerned with a voluntary settlement made in the year 1919 by one Arthur Burton. It was a settlement contrived for the purpose of "making some provision for the maintenance, "education and benefit" of Mr. Burton's two daughters, to whom I will hereafter refer, I hope not with disrespect, as Audrey and Ida.

It so fell out that both those daughters died, the one in 1927 and the other in 1952, unmarried and therefore without issue. The settlor had himself died 20 years before the death of Ida, so that the issue which has arisen is one between the estate of

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[1] [1902] A.C. 14.

[2] Ibid. 22.

C. A.

1955

BURTON'S SETTLEMENT TRUSTS, *In re.* PUBLIC TRUSTEE *v.* MONTEFIORE.

Evershed M.R.

the settlor, on the one hand, and the estates of the two daughters, on the other. On the one hand it is said that there was here no effective or intended disposition by this settlement other than that which emerges from the specific trusts set out in clause 3 and following; and that, since all those trusts failed, the resulting trust in favour of the original settlor survives and the property (and it is considerable: some £20,000) is to be treated now as part of the settlor's estate.

On the other side and for the appellants it is said that a true construction of clause 2 of the settlement—not, I agree, read in isolation, but read in the context both of the preceding recitals and of the subsequent operative clauses—is found, upon its language, to confer an absolute gift upon the two daughters Audrey and Ida, only limited to the extent of the subsequent trusts; so that, by reason of their failure, the absolute nature of the original disposition survives for the benefit of the daughters' estates.

That is the problem. As Roxburgh J. stated at the beginning of his judgment, this very difficult case is a further instalment in the chapter relating to the rule in *Hancock* v. *Watson* [3]; and he further observed that, though the rule may be simply stated, its application in particular instances is sometimes far from simple, and in this case very far from simple indeed. But for my part, having attended closely to the arguments with which the case has been illuminated in this court, I have reached a different conclusion from that which commended itself to Roxburgh J.; in other words, I think that upon its true construction there was, by virtue of clause 2, construed in its appropriate context, such a disposition in favour of Audrey and Ida as now survives for the benefit of their respective estates.

The recital states: "Whereas the settlor being desirous of "making some provision for the maintenance education and "benefit of his daughters Audrey Evelyn Burton and Ida Marion "Burton respectively has transferred the investments mentioned "in the schedule hereto into the joint names of the trustees "to be held by them irrevocably upon the trusts hereinafter "declared concerning the same Now this indenture witnesseth."

It is true, as Mr. Goff and Mr. Campbell for the respondent pointed out, that when one examines the document, the provisions which are ipsis verbis for the maintenance, education and benefit of Audrey and Ida are found in clause 3 (ii),

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[3] [1902] A.C. 14.

C. A.
1955

BURTON'S SETTLEMENT TRUSTS, *In re.* PUBLIC TRUSTEE *v.* MONTEFIORE.

Evershed M.R.

related exclusively to income. To that general statement, only this qualification should be added: that the peculiar terms of clause 5 of the settlement (which were not, I think, drawn to the attention of Roxburgh J.), do also contemplate a benefit in the form of capital application for Audrey or Ida. Nevertheless, I confess that that recital leaves in my mind a strong impression that the settlor is contemplating (and expressing that intention) an out-and-out disposition for good and all of the funds settled—with the primary object, of course, of benefiting the two daughters. I think that the final words "to be held by them "irrevocably upon the trusts hereinafter declared," which phrase must include the trusts of clause 2, lends some support to that view.

[His Lordship read the relevant clauses of the settlement, and continued:] Upon those clauses, it has been the argument of the respondent, which prevailed in the court below, that the provisions of clause 2 amounted to no more than a direction to the trustees to take the trust fund and to divide it into two equal parts, and to appropriate each such part for the trusts and purposes set forth in the following paragraphs, but for no other purposes. In a sentence, it was said that that clause with that meaning was of a merely administrative character.

There is no doubt that the language, at first blush, would strike the eye of the reader as being, at any rate primarily, directed to what might fairly be called "administrative purposes." There are no words of gift in clear or express terms. On the other hand, it is no less clear that words of that kind (namely, trusts to divide and appropriate) are apt and competent, in a proper context, to convey beneficial interests. Examples were cited to us by Mr. Jennings such as *In re Gatti's Voluntary Settlement Trusts* [4] and *In re Hatch.*[5] The only case which was brought to our attention where what Mr. Goff would call the "purely "mechanical nature" of clause 2 was emphasized by adding "divide or treat the same as divided without actual division," or where a closely comparable formula occurred, was *In re Walter's Will's Trusts*,[6] which came before my brother Jenkins when sitting at first instance; but my brother's decision in that case did not require that he should express a view whether the language in the will or instrument before him was such as to

[4] 52 T.L.R. 674; [1936] 2 All E.R. 1489.

[5] [1948] Ch. 592; [1948] 2 All E.R. 288.

[6] [1949] Ch. 91; [1948] 2 All E.R. 955.

confer by that language absolute gifts, and he preferred (to use his own language) "not to indulge in the expression of any "superfluous views" upon that matter. I do not, however, think that those added words "or without actual division to treat "the same as divided" are of real significance one way or the other.

From the point of view of the appellants it is significant that the only provision in this settlement, which produces the all-important result of equal division between the two principal beneficiaries and their children, is this clause 2, where it speaks of "division into two equal parts"; and I think that the direction to appropriate one of such parts as the share of each of the two daughters is equivalent to saying—a view supported by the opening words of clause 3—"appropriate as the share of or in "the trust fund of the two daughters," which is perhaps the same thing put in different language. I am inclined to think that clause 2, if it were intended as merely mechanical or administrative in purpose, is much more elaborate than is necessary or than one would expect; but it is not a question of looking at clause 2 in isolation. An examination of the other clauses reinforces the view to which I inclined by looking at the recitals and clause 2 itself. As Mr. Jennings observed, in the later clauses the settlor speaks passim of "the share of the "daughters," and "the share in the trust fund." There is a third point of considerable significance in that clause 3 opens: "The share of the trust fund of each of the said two daughters "of the settlor shall not vest absolutely"—a formula which, according to the ordinary sense of the language, seems to imply that at least it vests; and that what the settlor means is that, notwithstanding what otherwise would have been an absolute disposition, he now proposes to impose certain qualifications—and those qualifications follow.

The force of that particular formula clearly impressed itself upon the mind of Roxburgh J., though he was himself inclined to treat the word "absolutely" as being no more than a contrast to the limited or life interests subsequently given; but, with all respect, I do not think that is a sufficient answer to the force of the argument based on that language.

I come next to clause 4, because the judge thought that it was of considerable significance in determining this matter. Clause 4 is the accruer clause. As things have turned out, it does not in the least matter whether, if Mr. Jennings is in other respects right—that is, if his major premise arising out of clause 2 is

C. A.
1955

Burton's Settlement Trusts, *In re.* Public Trustee *v.* Montefiore.

Evershed M.R.

established—the two daughters' estates take the trust property equally between them, or whether the whole property goes to the estate of the daughter who lived longer, Ida; for I understand that all Audrey's property passed to Ida. That perhaps is fortunate, because I have had some little difficulty in accepting the view, which Mr. Jennings was inclined to advance, that the joint effect of clauses 2 and 4 was that, the whole property having gone, so to speak, together into the Ida half, the Audrey half having been added to Ida's, consequently, in the events which happened, the whole capital went to Ida's estate. It is unnecessary for me to express any view one way or the other upon that matter; but, as at present advised, I should not myself be prepared to assent to that conclusion.

I will refer to one of the cases to which Roxburgh J. referred, and which I have found useful upon this matter. It is *Attorney-General* v. *Lloyds Bank Ld.*,[7] which was in many ways a very curious case and, as regards the original disposition conferring the original absolute gift, the language was far more forceful in favour of an absolute gift than the language in the present case. In the events which had happened a settlor had—by an appointment, the power to make which he had conferred upon himself by an earlier settlement—conferred what, prima facie, were absolute interests upon three children in equal shares, and, as in this case and in many other cases in the books, the appointment then contained, grafted on to the original disposition, limitations qualifying the absolute nature of the first disposition, the qualifying dispositions including an accruer clause which mutatis mutandis can be taken, I think, as substantially equivalent to the accruer clause in this case. At the death of the settlor all these three children still survived, but none of them had any issue. The point in the case was one of death duties, but it was an argument put forward on behalf of the subject, which prevailed and was conclusive in the taxpayer's favour, that this was a *Hancock* v. *Watson*[8] case. Lord Tomlin referred to the nature of that rule, which I have quoted from Lord Davey's speech in *Hancock* v. *Watson*.[8] He continued[9]: "I am satisfied that the "frame of the appointment is such as to attract the application "of the rule . . . which admittedly is to be regarded in "construing non-testamentary instruments as well as in con-"struing testamentary documents." He cited Lord Davey's language[10] and he went on: "In the present case it is to be

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[7] [1935] A.C. 382.
[8] [1902] A.C. 14.
[9] [1935] A.C. 382, 394.
[10] [1902] A.C. 14, 22.

C. A.
1955

Burton's Settlement Trusts, *In re.* Public Trustee *v.* Montefiore.

Evershed M.R.

"observed that the gift is in the first instance absolute in "form," and he then quoted it. He proceeded: "throughout "the clauses containing the engrafted trusts there are phrases "indicating ownership such as the 'share of each child' or 'the "'shares in the trust fund of the others of the settlor's three "'children.'"

That language is applicable to the present case also by reason of the use of the formula "share of my daughter," etc.; but Lord Tomlin further said [11]: "I cannot find in the language of "the engrafted trusts anything appropriate to have effect if there "be a failure of the stocks of all three children." The engrafted trusts included the accruer clause. It is true, so far as I know, that the particular point, which was argued in this case, on the accruer clause was not debated in the House in *Attorney-General* v. *Lloyds Bank Ld.*[11]; however Lord Tomlin took the view that there would be nothing in the circumstance that, if all stocks failed, the result would be that, after the last surviving child had, as a result of the accruer clause, enjoyed the income of the whole fund, it would then, so to speak, go back into these three portions, each portion going to the estate of one of the three children. I have found that passage of some help towards my own inclination (and I express no final view) that a similar result, if it were necessary to decide it, should arise out of clause 4. However that may be, I think myself that the accruer clause, clause 4, does not really help the argument here one way or the other.

Clause 5 is obviously very peculiar, because at first sight it appears to be an ordinary, common form clause, giving the trustees power to advance part of the capital shares of one or other of the daughter's children for his or her benefit; but, as Jenkins L.J. observed early in the argument—it appears that no one had hitherto observed it—the subject-matter out of which the advancement may be made is not confined to the expectant share of the child, but includes "the share of such daughter"; and I find it difficult to resist the conclusion, as a matter of words, that there is power here for the trustees to raise up to half the daughter's share and apply that half share—that is, the capital—to the advancement or benefit of the daughter.

Having regard to the general nature of the settlement, to confer so far-reaching a power to apply capital to the life tenants in such an obscure, casual, not to say accidental manner is,

[11] [1935] A.C. 382, 395.

indeed, surprising; it may lead one to suppose that the clause was the result of some afterthought or amendment. But, be that as it may, if I am right about the effect produced by its terms, it will be seen that the interest of the daughter is not, therefore, in any event exclusively limited, according to the expressed language of clauses 3 and following, to income. Though I do not wish to place overmuch reliance upon it, I think the point which arises from clause 5 is an indication which favours the view, to which I have already expressed my adherence, that clause 2 is here apt to confer, and ought to be treated as conferring, vested interests in equal shares in the corpus of the fund in the two daughters limited, but only limited, to the extent of the continuing availability of the trusts expressed in the following clauses.

Matters of construction of this kind do not lend themselves usefully to over-long exposition. I do not forget the points which were argued, particularly that put forward by Mr. Campbell, that this is, after all, a settlement and not a will, and that, although the rule in *Hancock* v. *Watson*,[12] as Lord Tomlin quite clearly said, applies indifferently to both, in a settlement you may be less unwilling to allow a resulting trust, or even to suppose the contemplation of a resulting trust, than in the case of a will you would allow the possibility of an intestacy, because the residuary trusts were found in the end incomplete.

I add only that *In re Litt*,[13] to which our attention was also drawn, seems to me to have depended very much upon its own special facts. In that case the terms of the clause corresponding to clause 4 in the present case provided for accruer, not to the shares of the children but to the children themselves; and one of the original children's shares was not thereafter settled at all. In my opinion, *In re Litt* [13] is of little guidance towards the determination of the present problem.

I have attended to and benefited from the arguments; but my own conclusion, as a matter of construction of this document (which is plainly, as a matter of drafting, not perfect) is that the appellants in this appeal ought to succeed; and I therefore would allow the appeal.

JENKINS L.J. I agree. The question in this case is whether, upon its true construction, the settlement of April 10, 1919, gave to the two daughters of the settlor absolute interests in equal shares in the trust fund subject to trusts engrafted upon those interests, which, in the events which happened, did not exhaust the whole beneficial interest in the fund; or whether, on the other hand, the only interests given to the daughters were limited interests which did not exhaust the whole beneficial interest. In the former alternative, in the events which have happened, the fund must go to the estates of the daughters, or one of them; and, in the latter alternative, the fund must go to the estate of the settlor under a resulting trust. The question depends, as my Lord has said, entirely upon the construction of this particular settlement; and the question is whether it is a settlement which, on its true construction, attracts the rule in *Hancock* v. *Watson*[14] or *Lassence* v. *Tierney*.[15]

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[12] [1902] A.C. 14.

[13] [1946] Ch. 154; 62 T.L.R. 303; [1946] 1 All E.R. 314.

In order that this rule may apply, it is necessary to find in the will or settlement an absolute gift of the property in question. The provision relied on here as creating absolute gifts to the two daughters is contained in clause 2 of the settlement. The material words of that clause are: "Upon trust to divide "the trust fund or without actual division to treat the same as "divided into two equal parts and to appropriate one of such "parts as the share of each of them the said two daughters of the "settlor."

In my view, that language is well capable of being construed as having the effect of making a gift to each of the daughters absolutely of an equal share of the trust fund, that gift being made through the medium of the direction to divide the fund, or treat it as divided, and to appropriate it as mentioned in the clause. It is said that these words are purely administrative. Speaking for myself, I doubt if the argument is much advanced by using general expressions of that kind. According to the natural and ordinary meaning of the language here used, read in its entirety without adding or subtracting anything, it seems to me that it is well capable of being construed as giving the two daughters absolute beneficial interests each in one half of the trust fund.

So much for clause 2, taken by itself. Clearly it must be construed in the light of the other provisions of the settlement; and a prima facie view formed upon it one way or the other may be modified by the effect of the other parts of the deed. It seems to me, looking at the other provisions of the deed, that on balance they definitely tend to support, rather than to weaken, the conclusion that clause 2 did effect absolute gifts to the two daughters. The opening words of clause 3 are: "The share of "the trust fund of each of the said two daughters of the settlor "shall not vest absolutely in such daughter but shall be retained "by the trustees upon the trusts following." Thus one has a reference there to "the share . . . of each of the said two "daughters," which supports the conclusion that by clause 2 each of the daughters has been given a share. Then there is the provision that such share "shall not vest absolutely in such daughter," which, as my Lord has pointed out, suggests that, apart from such a direction against absolute vesting, absolute vesting would take place. Then in the provision for hotchpot in sub-paragraph (iii) of clause 3 of the settlement there is again a reference to "the share of such daughter"; and the accruer clause, again, has reference to "the share of either such daughter" and "to "the share of such other daughter." There is also a reference to "the trusts . . . herein declared and contained concerning her "original share." Lastly, in clause 5 there is a provision as to advancement, and, if upon its true construction that provision applies to the daughters as well as to the issue of the daughters, as to my mind it must, I think it is more consonant with the view that the daughters were given defeasible absolute interests than with the view that they took nothing beyond life interests.

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[14] [1902] A.C. 14.

[15] (1849) 1 Mac. & G. 551.

I agree with my Lord that little assistance on the question we have to decide is to be found in the accruer clause, apart from the phrases to which I have referred, which are appropriate to the view that each daughter had a share in the trust fund. Accordingly, I agree with my Lord that the right view in this case is that the rule in *Hancock* v. *Watson* [16] or *Lassence* v. *Tierney* [17] does apply, and consequently that there was no resulting trust for the settlor, but the original absolute gift remained and operated in favour of the estates of the two daughters, or possibly, the estate of Ida, as the last survivor of the two. Whether it goes to both estates or only to one of them is a matter of indifference, upon which no opinion need be expressed, inasmuch as we were told that the daughter Audrey, who died first of the two, in fact left all her property to Ida; so that the ultimate destination of the fund would be the same either way. Accordingly, I agree that this appeal should be allowed.

Hodson L.J. I agree. The judge attached little importance to the references in the settlement to the share of the trust fund

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[16] [1902] A.C. 14.

[17] 1 Mac. & G. 551.

C. A.
1955

Burton's Settlement Trusts, *In re.* Public Trustee *v.* Montefiore.

Hodson L.J.

in which each of these two daughters were to be interested; but I am of opinion that these references, which appear in several paragraphs of the settlement, support the view that the document is drawn up on the footing that a share had vested in each daughter, a share which was subsequently cut down by the trusts engrafted on the previous gift. That view is supported by Lord Tomlin's speech in *Attorney-General* v. *Lloyds Bank Ld.*[18] when he said in considering another settlement: "throughout the "clauses containing the engrafted trusts there are phrases "indicating ownership such as the 'share of each child' or "'the shares in the trust fund of the others of the settlor's three "'children.'" I think one gets assistance from that passage in saying that the use of the word "share" in this context indicates ownership.

Lord Tomlin continued: "Further I cannot find in the "language of the engrafted trusts anything appropriate to have "effect if there be a failure of the stocks of all three children." I think that passage also applies to this case. There being no provision for the daughters dying without issue, it is of some relevance, for, if the settlor had been trying to provide for every event, it would be, at any rate, the more difficult to argue that there was an absolute gift; but, if he does not do so, there is good ground for saying that there is a gift, which is intended to be cut down by the engrafted trusts.

I would also respectfully dissent from the way in which the judge interpreted the word "absolutely," treating the reference to the share not vesting absolutely as not being in contrast to an apparent absolute vesting in the preceding clause, but to the restriction of the interest in income during coverture, which was to be without power of anticipation, the contrast being between an absolute vesting, which would apply to capital, and a following interest of income. I should have thought for myself that the reference to the share not vesting absolutely more readily referred back to the preceding clause, which might otherwise be expected to make an absolute gift in favour of these daughters.

Appeal allowed.

Solicitors: *Stileman, Neate & Topping for Walker, Charlesworth & Foster, Leeds; Gregory, Rowcliffe & Co. for George Gatey & Son, Windermere; Routh, Stacey & Castle for Orford, Cunliffe, Greg & Co., Manchester.*

B. A. B.

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[18] [1935] A.C. 382, 395.

MARTELL AND OTHERS *v.* CONSETT IRON CO. LD.

[1954 M. No. 80.]

1954
Oct. 12, 13, 14, 22.

Danckwerts J.

C. A.

1954
Dec. 7, 8, 9, 10, 12.
1955
Feb. 3.

Jenkins and Hodson L.JJ. and Vaisey J.

Maintenance of suit—Common interest—Summons to stay proceedings —Unincorporated association supporting action for river pollution by plaintiffs with legal interests in river—Association having character of mutual protection society—Plaintiffs indemnified against costs—Interest of association sufficient to refute charge of illegal maintenance—Whether procedure by way of application for stay appropriate.

An association for the protection of the rights of owners and occupiers of fisheries, and for the prevention of pollution of rivers in Great Britain and Northern Ireland, supported an action brought against the defendant company by the plaintiffs, who were members of the association and were respectively a riparian owner and the six trustees of an angling club with a fishing tenancy on the River Derwent. The plaintiffs claimed that their fishery was being polluted by effluents from the defendants' ironworks. The support given by the association was in the form of indemnities for their costs in the action given to the plaintiffs by a trustee company controlled by the association. Membership of the association was open to all who supported its objects and the public was invited to contribute to its funds.

Before the action was heard, the defendants sought an order to stay the proceedings on the ground that the plaintiffs' action was tainted with illegality and an abuse of the process of the court, in that it was being maintained by a third party which neither had a sufficient common interest recognized by the law in the subject-matter of the action, namely, the pollution of the plaintiffs' part of the River Derwent, nor fell within any of the specific exceptions which justify maintenance of legal proceedings by third parties.

Danckwerts J. held that the plaintiffs had a common interest with the association, and that the support which they received in carrying on the action was not unlawful. He questioned whether, in a case where unlawful maintenance was established, an application to stay proceedings was the correct procedure. On appeal by the defendant company:—

Held that, since it had not been shown that the association was not a mutual protection society consisting substantially of persons possessed of legal and other interests relevant to the prevention of river pollution, it had a sufficient common interest in the subject-matter of the plaintiffs' action to justify it in maintaining, whether directly or through its instrument, the trustee company, an action brought by a member in defence of his legal rights, since by so doing the association was defending the collective interests of its members; nor was such legitimate maintenance rendered illegal by the fact that the membership of the association might include, and some of the funds at its disposal might be derived from, persons with no legal or relevant interests who merely objected on principle to the pollution of rivers.

Definitions of "common interest" in relation to maintenance by third parties of actions for libel, in *Alabaster* v. *Harness* [1895] 1 Q.B. 339; 11 T.L.R. 96 and *Oram* v. *Hutt* [1914] 1 Ch. 98; 30 T.L.R. 55 distinguished.

Scope of "common interest" as defined in *Plating Co.* v. *Farquharson* (1881) 17 Ch.D. 49 and *British Cash and Parcel Conveyors Ld.* v. *Lamson Store Service Co. Ld.* [1908] 1 K.B. 1006 applied.

Semble, that, even where an action is being illegally maintained, the procedure by way of ordering a stay of proceedings is inappropriate, since such a course involves, in effect, trying the question whether or not the alleged maintainer is committing a crime, in the absence of the accused maintainer.

Dictum of Sir William James V.-C. in *Elborough* v. *Ayres* (1870) L.R. 10 Eq. 367, 373 applied.

Decision of Danckwerts J. affirmed.

PROCEDURE SUMMONS.

The following statement of the facts is taken from the judgment of Jenkins L.J. in the Court of Appeal: The plaintiffs in the action were Mrs. Laline Marguerite Lucie Martell, the estate owner in fee simple and beneficial tenant for life in certain areas of land on either bank of the River Derwent at or near Consett in the County of Durham, and six other persons who as trustees for an unincorporated society, the Derwent Angling Association, held a yearly tenancy granted by Mrs. Martell's predecessor in title of the right of fishing in the waters of the River Derwent to which Mrs. Martell's riparian interests extended. The defendants, the Consett Iron Co. Ld., maintained and operated certain works near the River Derwent at a point upstream of Mrs. Martell's riparian property.

The plaintiffs claimed an injunction and damages in respect of the alleged pollution of the waters of the River Derwent flowing past or over Mrs. Martell's land by the discharge into the river through a tributary known as the Howden Burn of heated and noxious effluents from the company's works.

Before the action was heard, the defendant company by a summons applied to the court, asking that all proceedings in the action might be stayed until further order, on the sole ground that it was being illegally maintained and was for that reason alone oppressive and vexatious and an abuse of the process of the court and should, accordingly, be stayed unless and until it ceased to be so maintained. The persons by whom the action was said to be illegally maintained were an unincorporated body known as the Anglers' Co-operative Association (hereinafter referred to as "A.C.A."), and a company known as the A.C.A. Trustee Co. Ld. (hereinafter referred to as "the trustee company").

A.C.A. was formed in 1948, and was governed by rules, of which rule 1, headed "Objects," provided: "The objects of the "Association are: (a) To promote and protect the interests of "anglers, the owners and occupiers of fisheries (actual or "potential) in Great Britain and Northern Ireland and to assist "such owners and occupiers (financially or otherwise) to secure "the protection of the law against any invasion of their legal "rights. (b) To watch over, maintain and improve the condition, "purity and volume of rivers, lakes and other freshwater, and of "the coastal seawater in and around Great Britain and Northern "Ireland. (c) To promote, encourage and assist improvements in "methods of preventing pollution and of purifying effluents "generally and research in such matters and all other matters "affecting angling, fish culture and kindred subjects."

Rules 2 to 12, headed "Membership and Subscriptions," contained a number of provisions concerning those matters, including rules 2 and 3 as follows: "Membership and Subscrip-"tions. 2. Any person, firm, incorporated company, club, or "association interested in angling, fish culture, the manufacture "or sale of fishing tackle or accessories, catering, or the condition, "purity or volume of inland or coastal waters, shall be qualified "to be a member of this Association. 3. The membership shall "consist of ordinary members, trade members and club members, "and such other class or classes as the committee shall deter-"mine." The rules included provisions under which the annual subscription for an ordinary member was £1, with reductions in certain cases, the subscription for life ordinary membership was £10, and the subscription for club membership was at a graduated rate, according to the membership of the club, with a minimum of £1 1s. for a club with a membership of 50 or less, and a maximum of £10 10s. for a club with a membership of more than 500. Trade membership was thus defined in rule 8: "8. "Trade members shall be persons, firms and companies engaged "or interested by way of trade or business in the manufacture or "sale of fishing tackle, accessories or gear, fish culture or in "catering or any other trade or business connected directly or "indirectly with angling." Rule 9 provided that the annual subscription for a trade member should be such a sum not being less than £1 1s. as the committee should assess.

The rules also provided for the constitution of a council of the

Association by which, under rule 19, " the policy of the Association shall be determined and controlled," and for the management of the affairs of the Association by a committee which, under rule 28, " shall have control of the finances and " affairs of the Association and shall have absolute discretion in " administering the funds of the Association in accordance with " its objects and the policy laid down by the council, or otherwise carrying out the objects of the Association " under the rules. The rules also contained (in rule 25) provisions designed to insure that the members for the time being of the committee should also constitute the board of directors of the trustee company, their qualification shares being paid for out of the funds of, and held in trust for, the Association, and liable to transfer as directed by the committee upon the holder vacating office.

The trustee company was incorporated on June 5, 1949, with a nominal capital of £100 divided into 2,000 shares of 1s. each, of which 12 shares were issued for cash. Eight of these shares were held by the eight directors of the trustee company, who held one share each.

The main objects of the trustee company as set out in clause 3 of its memorandum of association were the following: " 3. (1) To " manage the property and affairs of the Anglers' Co-operative " Association. (2) To hold in trust for the benefit of the members " from time to time of the said Association . . . the whole assets " and undertaking of the Association. (3) To promote and protect the interests of anglers, the owners and occupiers of " fisheries and land under water, and all persons, companies, " firms, clubs and associations and other organizations concerned " or interested or engaged in or connected directly or indirectly " with the sport of angling. . . . (4) To watch over, maintain and " improve the condition, purity and volume of all rivers, lakes and " other freshwater in Great Britain and Northern Ireland which " now contains . . . fish . . . (13) To undertake or assist financially or otherwise in promoting or opposing litigation in any " cases affecting the interests of anglers, fishery owners, and " others interested in angling, the preservation, improvement or " purity of freshwater fisheries or any inland water in Great " Britain and to indemnify any members of the Association in " respect of any action taken or to be taken or defended or to be " defended or any liability incurred or to be incurred by him in " any case in which the Association may consider it conducive to " the interests of its members so to do, so far as may legally be " done without infringing the law against maintenance and "champerty. . . . (19) To provide or procure for members of the "Association such insurance or indemnities as may be required "by the Association for the benefit of its members and generally "to act as insurance agents or brokers for the Association and "its members."

The articles of association of the trustee company included the following provision as to directors: "14. So far as may legally be "practical and possible the directors of the company shall be the "persons from time to time constituting the officers and com- "mittee of the Association elected in conformity with the rules "thereof. 15. The qualification of a director shall be that he is "an elected officer or member of the committee of the Associa- "tion and the holder of one of the said shares of the company."

A.C.A. had some 5,000 members, on the footing that each club member was counted as one, but there were between 700 and 800 club members. If each member of each of these clubs was taken into account, the total number of persons associated with A.C.A., either directly as members of it themselves or indirectly as members of clubs who were members of it, was of the order of 250,000. During the period since its formation, A.C.A. conducted by means of pamphlets and periodicals and other forms of publicity, an active campaign against the pollution of rivers by industrial effluents, sewage, and so forth, and frequently lent its support to negotiations or litigation directed to the prevention of pollution in particular cases. There was nothing in the rules of A.C.A. to confine the giving of assistance of this sort to members of the Association, but it was in practice so confined.

A.C.A., in conjunction with the trustee company, established a fighting fund in the form of guarantees given by supporters to the trustee company, whereby the guarantors undertook to contribute up to a specified amount towards any sum which the trustee company might be called on to pay under any guarantee or indemnity given by the trustee company in respect of the costs of an action to stop or prevent pollution. As a general rule the persons giving guarantees for the fighting fund would either be, or on the occasion of giving the guarantee become, members of A.C.A., but it was not clear that there had not been cases in which guarantees by non-members had been given and accepted. A.C.A. had also, in the course of its campaign, solicited donations as well as exhorted new members to join its ranks, and donations had been accepted from members and non-members alike. Membership of A.C.A. was not confined to persons having legally enforceable interests as riparian owners or owners or lessees of fishing rights. Nor was such membership confined to anglers, as the wide terms of rule 2 clearly showed.

The Derwent Angling Association had a maximum membership of 150, and its strength at the date of appeal was slightly under that figure. Its members were drawn mainly from weekly wage-earners, such as miners, steel workers and shop assistants in the district, with an average income of some £8 per week. The subscription was 10s. yearly, reduced to 5s. in the case of old-age pensioners. The Derwent Angling Association became a club member of A.C.A. in 1949. In or about the following year, it applied to A.C.A. for assistance with regard to the alleged pollution of the River Derwent by effluent from the defendant company's works, and was advised by A.C.A.'s solicitors that arrangements should, if possible, be made for the riparian owner (that is to say, Mrs. Martell) to join as a plaintiff in any proceedings. Mrs. Martell's assent to this course (on terms that the Derwent Angling Association were not to look to her for any costs) was obtained in June, 1951, and she became, on or about October 23 of that year and continued to be, a member of A.C.A., her annual subscription of £1 being paid by the Derwent Angling Association.

On October 29, 1951, the trustee company executed two deeds of indemnity addressed respectively to Mrs. Martell and the trustees of the Derwent Angling Association, which were relied on by the defendant company as constituting illegal maintenance of the present action. The indemnity given to Mrs. Martell was in these terms: It was addressed to Mrs. Martell and went on: "The A.C.A. Trustee Co. Ld. hereby undertake to indemnify "you as a member of the A.C.A. against all costs, charges, "expenses and liability which may be incurred by you and may "not be recovered from the defendants in connexion with the "claim and consequent legal proceedings by you either alone "or jointly with any other person or persons against the Consett "Iron Co. Ld. for an injunction and/or damages in respect "of the pollution of the River Derwent (County Durham) "provided that the A.C.A. shall be entitled to control the conduct "of such proceedings in your name and for that purpose to retain "solicitors, counsel and expert witnesses on your behalf, and to "require you to settle, compromise or discontinue such proceedings at any time or to refrain from doing any of such things, "and in the event of your refusing or failing so to do or if you "shall cease to be a member of the A.C.A. this undertaking shall "thereupon become null and void save as to any costs, charges "and expenses incurred on your behalf up to the date of such "refusal or failure and not recoverable against the defendants." It was given under the common seal of the trustee company. The indemnity given to the trustees of the Derwent Angling Association was in precisely similar terms, save that it was limited to costs, charges and expenses and liability in excess of £50.

The writ in the action was issued on January 7, 1954. The documents disclosed by the plaintiffs under the usual order for discovery included the two indemnities of October 29, 1951, and the disclosure led the defendant company to make the application for a stay of proceedings.

Sir Andrew Clark Q.C. and *Kenneth Elphinstone* for the defendant company. Maintenance is defined by Blackstone as an "officious intermeddling in a suit that in no way belongs to "one, by maintaining or assisting either party with money or "otherwise, to prosecute or to defend it" (Comm. IV., 134). Making oneself liable for the costs of another's suit is therefore maintenance. It is both a crime (being a misdemeanor at common law) and a tort; and it follows that to maintain one party to an action is both vexatious and oppressive. The merits of the maintained suit are wholly immaterial; no mens rea is necessary to constitute the criminal offence of maintenance, but it is no less a crime because the maintenance is done with the highest and most laudable objects.

Maintenance may be excused in certain specified cases established by the court as exceptions to the general rule, but these are well defined and will not now be extended: see *Alabaster* v. *Harness.*[1] There are three recognized exceptions to the rule that maintenance of a suit is illegal: (1) near kinship to the person maintained—the nearest that exception has gone is to brothers-in-law; (2) charity—but it is not known to what extent that would hold good today because of legal aid; (3) where the maintained person had a common interest in the subject-matter in suit. Apart from those exceptions all intermeddling is illegal.

There was no common interest here, which must be an interest recognized by the law in the subject-matter of the action in issue between the parties: *Alabaster* v. *Harness.*[2] An incidental interest or a mere sentimental interest is not enough; nor is any other interest in the suit or the result of the suit not recognized by the law; that may be subject to the exception of a test action. It follows that the maintenance of a pending action is an abuse of the process of the court; and the court will not allow it to continue once maintenance has been established, because it would be using the court's jurisdiction for an illegal purpose. The court will stay the action until all the maintenance has been purged. [Reference was made to Halsbury's Laws of England, 2nd ed., vol. 1, pp. 69, 70 and 72.]

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[1] [1895] 1 Q.B. 339, 343; 11 T.L.R. 96.

[2] [1895] 1 Q.B. 344.

As to trade unions, in the special circumstances of disputes between employers and employees and where employees are treated unlawfully, a common interest exists: see Halsbury's Laws of England, 2nd ed., vol. 32, p. 495. But in *Greig* v. *National Amalgamated Union of Shop Assistants, etc.*,[3] a trade union which instigated an action not confined to such special circumstances was held guilty of maintenance. It was held in *Oram* v. *Hutt*[4] that it was maintenance for a trade union to pay the costs of a slander action brought by an official of the union, although the plaintiff was slandered in his position as officer of the union. Lord Sumner said in that case that a common cause was not a common interest. In *Skelton* v. *Baxter*[5] it was held that an approved society could assist an injured workman in a claim for compensation against his employer, but the question whether the interference was such as might amount to maintenance was left open, although it was said that probably it was not maintenance as the society had a financial interest in procuring compensation for the workman from his employer rather than out of the funds of the society. In *Neville* v. *London "Express" Newspaper Ld.*[6] the question of maintenance was fully discussed by the House of Lords; the plaintiffs' action is clearly maintenance as there defined. [Reference was also made to *Wild* v. *Simpson*[7]; *Allen* v. *Francis*[8] and *Wallis* v. *Duke of Portland*.[9]]

Charles Russell Q.C. and *G. H. Newsom* for the plaintiffs. These documents, if the defendants be right in their argument, are a nullity, because they would be ultra vires the powers of the A.C.A. Trustee Co. Ld.

This is an application for a form of relief for which no authority exists in any textbook or in any authority. If the courts were minded to stay proceedings which were otherwise perfectly justified, one would expect there to have been some trace of it in the authorities; and if textbook writers had thought that such a way of putting an end to an action existed, some reference to it would have been expected. There is no record in all the centuries of a single case where such an application has been made. Although there is a dictum of Atkins L.J. in *Wild* v. *Simpson*[10] in which he reserved his opinion on the question whether the court had power on being satisfied that pending proceedings were being unlawfully maintained to stay them as being vexatious and oppressive until purged of their illegality, Atkins L.J. does not indicate what is his opinion.

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[3] (1906) 22 T.L.R. 274.

[4] [1914] 1 Ch. 98; 30 T.L.R. 55.

[5] [1916] 1 K.B. 321, 328; 32 T.L.R. 130.

[6] [1919] A.C. 368; 35 T.L.R. 167.

[7] [1919] 2 K.B. 544; 35 T.L.R. 576.

[8] [1914] 3 K.B. 1065; 30 T.L.R. 695.

[9] (1797) 3 Ves.Jun. 494.

To set the court in motion for a particular object may itself be unlawful but the proceedings remain valid. The court will not stay an action by persons who are themselves innocent of any offence and have a sound cause of action. The argument here relates only to the question of plaintiffs, it does not touch the question as to what the court would do where defendants are guilty of maintenance.

In *Wallis* v. *Duke of Portland*[11] a solicitor was seeking to sue on the agreement for maintenance, and it needs no argument or discussion that an agreement for illegal maintenance cannot be enforced. That case is irrelevant on the present application, and it does not lay down that the court will not allow a maintained action to go on, for the action in that case was not a maintained suit, but was an action on the agreement for maintenance. *Greig* v. *National Amalgamated Union of Shop Assistants, etc.*[12] shows that a union had illegally maintained an action for libel, but it was said (although it was not decided) that the support of an action by a union for the recovery of wages appeared to be justifiable.

This application is an attempt to counter the law that an allegation of illegal maintenance is not a defence to an action: see *Skelton* v. *Baxter*,[13] because it appears that a stay would operate as a defence. The process of the court is not being used for an illegal purpose; it is being used by the plaintiffs to assert their common law rights, and the fact that they are relying on an indemnity does not alter the fact that the court is being used for the perfectly legal purpose of seeking to obtain judgment to stop the continuing wrong of heating and polluting water. The defendants have not satisfied the court that anyone is illegally maintaining this action. They have failed to discharge the heavy onus of showing that a crime has been committed by someone not before the court. The cases cited have related to libel and slander; the clue to that is to be found in *Alabaster* v. *Harness* [14]—that libel and slander are essentially personal actions and there is no possibility of a common interest.

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[10] [1919] 2 K.B. 544.

[11] 3 Ves.Jun. 494.

[12] 22 T.L.R. 274.

[13] [1916] 1 K.B. 321, 326.

It is sometimes said in maintenance actions that a common interest must be a legal interest, but that does not mean legal as opposed to equitable, it means legal for the purpose of the law of maintenance, and it does not mean that everyone subscribing to the costs of an action must have an interest in the result of the action; otherwise it could not have been suggested in *Greig* v. *National Amalgamated Union, etc.*,[15] that an action by a trade union would be lawful, and no test action could ever be sustained. It is almost common knowledge that trade unions back actions by workmen against their employers. Trade unions have their special law, but it does not touch this point. It was accepted in *Greig's* case [15] that a trade union was entitled to protect a workman's interest on the ground of common interest, but that that interest did not extend to libel. No one suggests that support by trade unions is maintenance; it is closely analogous to the position here, where people are interested in putting their money together in a pool to fight pollution. It is only right and proper that those interested in the prevention of pollution should band together if it is their only way to get their common law rights: see *British Cash and Parcel Conveyors Ld.* v. *Lamson Store Service Co. Ld.*[16] and *Plating Co.* v. *Farquharson.*[17] That cannot be maintenance if it is not equally maintenance in the case of trade unions. Professional associations also exist to provide funds to fight actions for their members

It is doubtful if any big commercial concern would say that the remedies under the criminal law and pollution Acts would be so effective as an action at common law to stem the rising tide of pollution. It is not a sentimental interest but a practical one. The more persons are stopped from polluting rivers, the more it acts as a salutary deterrent to others. Interference by the A.C.A. does not always end in litigation; there is nothing illegal in this action; the plaintiffs asked for help from the A.C.A., and they got it.

Maintenance is said to be a wrong on the ground of public policy, but public policy is flexible and may change. The article in The Times newspaper of October 26, 1951, praising the work of the A.C.A. was an indication of the trend of public policy.

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[14] [1895] 1 Q.B. 339.

[15] 22 T.L.R. 274.

[16] [1908] 1 K.B. 1006.

[17] (1881) 17 Ch.D. 49.

There is also the question whether, if this were otherwise illegal maintenance, it could be redeemed under the heading of poverty. Poverty does not mean destitution but lack of sufficient financial ammunition to assert one's rights. Few people could afford to conduct a case against a firm like the defendant company, for instance; that was why the A.C.A. was formed—to attack polluters who would rather fight than alter their ways: *Plating Co.* v. *Farquharson* [17]; *Holden* v. *Thompson.*[18] Charity is still a proper motive for assisting a poor litigant.

G. H. Newsom following. It is said that criminal proceedings could be brought instead of a common law action. There are only two statutes concerned: the Salmon and Freshwater Fisheries Act, 1923, and the Rivers (Prevention of Pollution) Act, 1951. While the penalties under the latter Act are somewhat the heavier, those under either Act would be inadequate against a great corporation.

Sir Andrew Clark Q.C. in reply. The meaning of common interest was stated in *Bradlaugh* v. *Newdegate*,[19] and approved in *Alabaster* v. *Harness*,[20] which was approved in *Neville* v. *London "Express" Newspaper Ld.*[21] As a result of those decisions a common interest means an interest (i.e., legal or equitable) which is recognized by the law and enforceable by the law in the suit or some interest in the suit: see *Alabaster* v. *Harness*,[22] *per* Lord Esher M.R. and Lopes L.J. The most recent affirmation by Lynskey J. in *Baker* v. *Jones* [23] shows that nothing has been done to whittle away that principle. It has never been shown that the A.C.A. had a common interest. The A.C.A. is an unincorporated body, and therefore it is the mass of all its members, and its interest must be that of all its members; it is not enough that it is the interest of one or two of its members.

There is no direct decision that a trade union can support an action by a workman against his employer, only dicta. It might be that if the case were taken to the House of Lords the trade unions might be held to be an exception to the general rule, but that would not help the A.C.A. Trade unions are composed of workmen all working in one particular sphere in which the union acts for them; they have thus a common interest, but it is not suggested that they could sue for river pollution. The power of trade unions is limited: *Allen* v. *Francis.*[24] If the A.C.A. were restricted to riparian owners and owners of fishing rights their position might be closer to that of trade unions, although trade unions have always been regarded by the law as something special.

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[17] (1881) 17 Ch.D. 49.

[18] [1907] 2 K.B. 489, 492.

[19] (1883) 11 Q.B.D. 1.

[20] [1895] 1 Q.B. 339.

[21] [1919] A.C. 368.

[22] [1895] 1 Q.B. 339, 343, 344.

[23] [1954] 1 W.L.R. 1005; [1954] 2 All E.R. 553.

[24] [1914] 3 K.B. 1065.

Support of a test case is only legal if it is a strict test case and the other parties agree to be bound by the result; then of course they have a common interest.

The authorities refer to the exception of poverty from the law of maintenance as being on the grounds of charity; but charity means the relief of real poverty; a person is not a proper object of charity because he is poorer than his opponent. It means that he is too poor to defend his rights. Mrs. Martell could not be said to be an object of charity; she could not get legal aid; she could bring this action but she would not want to do so.

The offence of maintenance is committed by the promise to pay, on the reliance on which this action went on. But it is not necessary to rely on the indemnities; there are numerous other examples of maintenance in the evidence, for instance, the plaintiffs handed over the conduct of the action to the A.C.A.

The action is not illegal, but it is illegally maintained; and it would be absurd to suggest that the court had no power to stay such an action. The fact that the jurisdiction has never been invoked before has nothing to do with the point whether the court has jurisdiction. Every point must be taken for the first time at some time. It may be possible to get an injunction to stop people who have maintained and who threaten to continue maintaining: *British Cash and Parcel Conveyors Ld.* v. *Lamson Store Service Co. Ld.*[25] Atkin L.J. in *Wild* v. *Simpson*[26] regarded the maintained person as privy to the illegality and not as an innocent party.

Whether proceedings should be stayed is usually a matter of discretion, but it would not be a right use of the discretion to refuse a stay where the continuance of the action is illegal.

As to the change in public policy because of pollution of rivers, public policy is a question for the legislature and not for the court, but once the legislature has established what is public policy, the courts cannot change it. The legislature has given an indication in the Rivers (Prevention of Pollution) Act, 1951, where the restrictions on pollution are excepted in the case of trade effluent, that if public policy had changed, it was in favour of industry.

Cur. adv. vult.

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[25] [1908] 1 K.B. 1006, 1017.

[26] [1919] 2 K.B. 544.

October 22. DANCKWERTS J., having stated the facts, read the following judgment: It is claimed on behalf of the defendant company that these deeds of indemnity constitute the tort and crime of maintenance, and therefore the plaintiffs' action should be stayed. The merits of the action are not an issue or to be treated as relevant, it is said, for the purposes of the application. But it is contended on behalf of the defendant company that the action should be stayed and the plaintiffs should not have the chance to have their case heard, so long as they receive the assistance of these indemnities without which the plaintiffs would not feel able to face the formidable expense which, it is well known, the carrying on of a pollution action involves. If this contention is correct, it may be thought that there is something wrong with the state of the law. In an appeal by the Anglers' Co-operative Association (circulated without reference to this particular action) it is claimed that "it is the lamentable fact "that there are many hundreds of polluters operating today, "knowing perfectly well that they are in the wrong but believing "that no one can afford to start an expensive action for an "injunction to stop them."

This happens to be a case about the interests of anglers, but the principle involved is of much greater importance. It would be disingenuous to disregard the difficulties which the man of small financial resources (not confined to the legal aid class) faces in present-day conditions in defending such rights as he may have against infringement by powerful commercial corporations or adversaries who may draw their strength from the rates or the National Exchequer. If such a man may not avail himself of the help of sympathisers, his condition may be serious indeed. His relative position is still more unfavourable if his powerful commercial opponents may deduct the costs of such litigation as trade expenses.

The English law of maintenance was the product of particular abuses which arose in the conditions of English medieval society. Grievances of those times produced a series of statutes imposing penalties on the offences of maintenance and champerty. According to Professor Sir William Holdsworth (History of English Law, 1909, vol. 2, p. 376), maintenance was not at first a private wrong; it was made actionable by the statute of 4 Edw. 3, c. 11 (which was repealed by the Statute Law Revision and Civil Procedure Act, 1881). But there is no doubt that it has for a long time been treated as a common law misdemeanor and a tort.

1954

MARTELL
v.
CONSETT IRON
CO. LD.

Danckwerts J.

Blackstone (Commentaries IV, 134) defines maintenance as "an officious intermeddling in a suit that no way belongs to one, "by maintaining or assisting either party with money or other-"wise, to prosecute or defend it." Lord Abinger in *Findon* v. *Parker*,[1] said[2]: "The law of maintenance, as I understand it "upon the modern constructions, is confined to cases where a "man improperly, and for the purpose of stirring up litigation and "strife, encourages others either to bring actions, or to make "defences which they have no right to make." Lord Haldane in *Neville* v. *London "Express" Newspaper Ld.*[3] said[4]: ". . . the "broad rule remains unrepealed by any statute that it is unlawful "for a stranger to render officious assistance by money or other-"wise to another person in a suit in which that third person has "himself no legal interest, for its prosecution or defence." I observe that each of these definitions qualifies the interference which gives rise to the wrong with the words "officious" or "improperly." It may be that the argument for the defendant company in the present case was not intended to avoid this qualification, when it was contended that all maintenance was unlawful unless it fell within one of the recognized and (as it was claimed) strictly limited cases of justified interference or "excuses." These exceptions from the general rule were said to be (1) near relationship between the maintainer and the person maintained; (2) charity; and (3) where the maintainer and the person maintained have a common interest in the subject-matter of the suit, which, it is said, must be such an interest as is recognized by the law and not merely a sentimental interest. Sir Andrew Clark referred me to a number of authorities in support of his propositions, which I will proceed to examine.

In *Wallis* v. *Duke of Portland*[5] Lord Loughborough L.C. (whose decision was affirmed in the House of Lords) dismissed a bill for discovery of a transaction which would amount to maintenance, on the ground that it was not[6] "fit for a court of equity "to permit this suit to proceed any farther." Lord Loughborough, in the course of his judgment, said[7]: ". . . maintenance "is not malum prohibitum, but malum in se: that parties shall "not by their countenance aid the prosecution of suits of any "kind; which every person must bring upon his own bottom and "at his own expence."

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[1] (1843) 11 M. & W. 675.
[2] Ibid. 682.
[3] [1919] A.C. 368; 35 T.L.R. 167.
[4] [1919] A.C. 390.
[5] (1797) 3 Ves.Jun. 494.
[6] Ibid. 503.
[7] Ibid. 501, 502.

In *Bradlaugh* v. *Newdegate*,[8] the plaintiff having sat and voted as a member of Parliament without having made and subscribed the oath required, the defendant, who was also a member of Parliament, procured a common informer to sue the plaintiff for the penalty and, after the action had begun, gave him an indemnity against the costs of the proceedings. The action failed, as the House of Lords decided that the relevant section did not enable a common informer to sue for the penalty. The plaintiff, being unable to recover his costs from the impecunious informer, brought an action of maintenance against the defendant, which succeeded, as it was held that the defendant and the informer had no common interest in the result of the action for penalty. In the judgment of Lord Coleridge C.J. there is the following passage[9]: "It is said, however, that the "defendant had or believed that he had a common interest with "Mr. Clarke in the result of the suit, and that, therefore, his "finding Mr. Clarke the whole money for the litigation was not "maintenance. As a general rule there is no doubt that such "common interest, believed on reasonable grounds to exist, will "make justifiable that which would otherwise be maintenance. "The oldest authorities, authorities which hold a multitude of "things to be maintenance which would not be held so now, all "lay down this qualification. Brooke, Fitzherbert, Rolle, "Hawkins, Viner, Comyns, to cite no more, all concur in this. "Buller J., in his celebrated judgment in *Master* v. *Miller*,[10] "strongly insists upon it. But then the instances they give "shew the sort of interest which is intended. A master for a "servant, or a servant for a master; an heir; a brother; a "son-in-law; a brother-in-law; a fellow commoner defending "rights of common; a landlord defending his tenant in a suit for "tithes; a rich man giving money to a poor man out of charity "to maintain a right which he would otherwise lose. But in all "these cases, the interest spoken of is an actual valuable interest "in the result of the suit itself, either present, or contingent, or "future, or the interest which consanguinity or affinity to the "suitor give to the man who aids him, or the interest arising "from the connexion of the parties, e.g., as master and servant, "or that which charity and compassion give a man in behalf of a "poor man who, but for the aid of his rich helper, could not "assert his rights, or would be oppressed and overborne in his "endeavour to maintain them."

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[8] (1883) 11 Q.B.D. 1.

[9] Ibid. 11.

[10] (1791) 4 T.R. 320.

Alabaster v. *Harness*[11] was a case in which the defendant, who was interested in the sale of certain electric appliances for the treatment of disease, had instigated an expert, whose favourable report on the appliances had been adversely criticized by the plaintiffs in their newspaper, to bring an unsuccessful libel action against the plaintiffs. The plaintiffs, who had been unable to obtain satisfaction for their costs, brought an action against the defendant for maintenance. It was held by the Court of Appeal that the action was maintainable on the ground that the defendant had no common interest in the action for libel. Lord Esher M.R. said[12]: "The doctrine of maintenance, which appears in the Year "Books, and was discussed briefly by Lord Loughborough in "*Wallis* v. *Duke of Portland*,[13] and more elaborately by Lord "Coleridge, C.J., in *Bradlaugh* v. *Newdegate*,[14] does not appear "to me to be founded so much on general principles of right and "wrong or of natural justice as on considerations of public policy. "I do not know that, apart from any specific law on the subject, "there would necessarily be anything wrong in assisting another "man in his litigation. But it seems to have been thought that "litigation might be increased in a way that would be mis- "chievous to the public interest if it could be encouraged and "assisted by persons who would not be responsible for the "consequences of it, when unsuccessful. Lord Loughborough, in "*Wallis* v. *Duke of Portland*,[15] says that the rule is 'that "'parties shall not by their countenance aid the prosecution of "'suits of any kind; which every person must bring upon his own "'bottom, and at his own expense.' But the law from the "earliest times has countenanced some relaxation of the utmost "strictness of that rule; and some particular cases have been "specifically allowed as constituting excuses for that interference "in the suit of another which would otherwise have amounted to "maintenance." It is easy to understand that the defendant in this case may well have thought that he had a legitimate interest in trying to get the criticisms of his appliances destroyed in the course of the libel action, but this case is one of several decisions holding that one person has not a legitimate interest in supporting another person's libel or slander action.

Oram v. *Hutt*[16] is another example. Payment of the costs of a slander action brought by an officer of a union out of the funds of the union in pursuance of an indemnity was held by the Court of Appeal to be obnoxious to the law of maintenance and ultra vires even though the officer had been slandered by way of his office as well as personally. It appears that the union might have brought a slander action for slanders uttered in the same speech. But Lord Sumner said[17]: "a common cause is not a "common interest."

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[11] [1895] 1 Q.B. 339; 11 T.L.R. 96.

[12] [1895] 1 Q.B. 342.

[13] 3 Ves.Jun. 494.

[14] 11 Q.B.D. 1.

[15] 3 Ves.Jun. 494, 502.

[16] [1914] 1 Ch. 98; 30 T.L.R. 55.

Skelton v. *Baxter*[18] was, I think, referred to by way of contrast, as a case in which it was held that an approved society might properly suggest to an injured workman that he should take proceedings against his employer and indemnify him against costs, because the intention of the National Insurance Act, 1911, was that compensation should primarily be paid by an employer rather than out of the funds administered through the approved society.

Baker v. *Jones*[19] may be said to show that the action of maintenance is still alive today. Lynskey J. said[20]: "Maintenance in earlier days was a far-reaching and important branch "both of civil and criminal law. The common law does not "approve of the intervention of any man in the litigation of "another with which he had no lawful concern, whether that "litigation is well-founded or not. In these days, however, of "insurance policies giving an indemnity against both damages "and costs to wrongdoers, trade unions whose rules provide for "paying the legal costs of their members, and the Legal Aid "Acts, maintenance is not now regarded with the same repugnance as it was by the old common law. The offence and tort "of maintenance, however, still exist, and the common law rules, "although much modified and, as some say, almost atrophied, "still must be applied." Lynskey J. found himself compelled to apply the law of maintenance in the case which he had before him, but that case was very different from the present; it was simply another example of an ultra vires application of the funds of an unincorporated association in the payment of costs incurred in two libel actions brought against officers and members of the central council of the association.

I have now to consider the case in the House of Lords of *Neville* v. *London "Express" Newspaper Ld.*[21] Their Lordships were considerably divided on the points which were decided in this case. They held, by a majority of three to two, that an action for damages for maintenance will not lie in the absence of proof of special damage; and they held, by a differently constituted majority of three to two, that the success of the maintained litigation, whether an action or a defence, is not a bar to the right of action for maintenance. Lord Finlay, the Lord Chancellor, was the only one of the Lords who was in the majority on each of the points; the other four Lords were in the dissenting minority on one or other of the points decided. The plaintiff, who brought the action against the London Express Newspaper, can have had very little merit on his side, for he had been held by Younger J. (in two actions by some 125 plaintiffs) to have launched a fraudulent scheme for the purposes of his land development venture. On the other hand, the London Express Newspaper, in offering to take legal proceedings at their own expense on behalf of all the defrauded prize-winners who sent in their names to the solicitors employed by the newspaper, may be thought to have been officious, to say the least. The nature of the action for maintenance, however, was discussed at length in the House of Lords, and the question is whether, by reason of their observations, I am compelled to hold the support given to the plaintiffs in the present case to be unlawful maintenance.

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[17] [1914] 1 Ch. 106.

[18] [1916] 1 K.B. 321; 32 T.L.R. 130.

[19] [1954] 1 W.L.R. 1005; [1954] 2 All E.R. 553.

[20] [1954] 1 W.L.R. 1011.

[21] [1919] A.C. 368; 35 T.L.R. 167.

It should be noticed that, according to the decision of the majority in the House of Lords, the plaintiff's action for maintenance failed because the plaintiff failed to prove special damage, though he had been compelled to repay money which he had obtained by fraud and to pay costs in respect of his having resisted payment. Lord Finlay's view was that it could not be regarded as damage sufficient to maintain an action that the plaintiff has had to discharge his legal obligations or that he has incurred expenses in endeavouring to evade them. Accordingly, though it is said that the success of the maintained litigation is not a bar to the action for maintenance, it must be difficult to prove special damage when the plaintiff in the maintenance action has been unsuccessful.

I have carefully considered the speech of Lord Finlay in this case, and I cannot find any consideration by him of the amount or nature of the common interest or other circumstances which will justify the support of an action or defence by outside parties. Lord Finlay, as it seems to me, was devoting his mind entirely to the two questions, (1) must the plaintiff prove that he has suffered damage, and (2) must he have been successful in the proceedings that were unlawfully maintained.

Lord Haldane was among those who dissented from the opinion of the majority on the question of the necessity of damage being proved. He makes some observations on the nature of maintenance [22]: " It is true that the courts are not to-day disposed to " extend the principle, and that various exceptions to or legal " excuses for it, such as that resting upon motives of charity, " have been introduced. A common interest, speaking generally, " may make justifiable that which would otherwise be maintenance. But the common interest must be one of a character " which is such that the law recognizes it. Such an interest is " held to be possessed when in litigation a master assists his " servant, or a servant his master, or help is given to an heir, or a " near relative, or to a poor man out of charity, to maintain " a right which he might otherwise lose. But in the present case " none of these justifications are present, for the case is simply " one of a newspaper undertaking to conduct a suit for any " reader with a case who may apply to it, whether rich or poor " and without distinction of person."

I do not feel difficulty in agreeing with the conclusion in the last sentence. It may well be wrong that a newspaper, principally concerned with improving its circulation, should be allowed, on the ostensible ground of public duty, to stimulate litigation and maintain proceedings. It seems to me quite a different matter for a number of persons who fear present or future interference with their proprietary rights or an attack upon their conditions of living to combine together to resist or attack aggressors. Further, what may have been the last word on public policy in 1919 is not necessarily the test in 1954.

In this context, I would refer to the observations of Lord Shaw [23]: " The search in Hawkins' Pleas of the Crown would " yield a rich reward to those who inquired as to the extraordinary " lengths to which in certain ages, and by certain authors, the " doctrine of maintenance was carried. As, for instance, this: " Maintainers, it is said, include all such as assisted ' by opening " ' the evidence to the jury; or by giving evidence officiously " ' without being called upon to do it; or by speaking in the " ' cause as one of the counsel with the party; or by retaining " ' an attorney for him; or perhaps by barely going along with " ' him to inquire for a person learned in the law.' It was as if " law courts were a plague-ridden or infected area, to help " another into which was an injury and a crime. Needless to say,

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[22] [1919] A.C. 389.

[23] Ibid. 414.

"these things, once claimed as being part of the common law of "England, have long since disappeared. They are repugnant to "sensible and modern ideas. What remains of the doctrine "deserves, in these circumstances, a scrupulous examination; "and I am of opinion that the test of maintenance is the test of "the quality of the act itself as it bears upon the attainment of "justice in the particular case, and that the test either of tort "or of offence is primarily whether it contains that quality which "is essential both by the statute and the common law of "England."

With these remarks of Lord Shaw I respectfully agree, and I ask the rhetorical question: how can such a doctrine founded upon considerations of public policy become at some point frozen into immutable respectability, so as to be no longer capable of alteration? No wonder Lord Dunedin in *Weld-Blundell* v. *Stephens* [24] described the action of maintenance as [25] "a cumbersome curiosity of English law." It seems to me that unless the law of maintenance is capable of keeping up with modern thought, it must die in a lingering and discredited old age.

I now turn to cases which show a different picture. *Plating Company* v. *Farquharson* [26] was not a case of an action of maintenance. Unsuccessful defendants in an action for infringement of a patent for nickel-plating, having given notice of appeal, procured the insertion in a newspaper of an advertisement inviting the trade to subscribe towards the expenses of the appeal and offering a reward of £100 to anyone who could produce documentary evidence that nickel-plating was done before 1869. The plaintiffs in the action moved for committal of the publishers of the newspaper for contempt of court. It was held that, as all the persons engaged in the trade of plating had a common interest in resisting the claims of the plaintiffs, an advertisement asking them to contribute to the expenses of defending the proceedings was open to no objection. It is interesting to observe that the advertisement stated that several influential firms had already come forward and volunteered to pay their share of the expenses. If the contentions of the Consett Iron Company in the present case are correct, the plaintiffs in *Farquharson's* case could have attacked the defendants on the ground of unlawful maintenance of the defence in the action. But Sir George Jessel M.R. said [27]: "All the trade is interested in freeing the trade from monopoly of "any kind, whether by patent or otherwise; and we know that it

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[24] [1920] A.C. 956; 36 T.L.R. 640.

[25] Ibid. 977.

[26] (1881) 17 Ch.D. 49.

[27] Ibid. 54.

"is customary for the members of a trade to combine for that "purpose, on the same principle that people claiming a right of "common are allowed to combine to assist a defendant who is "interfered with by the lord, on the ground that right of common "does not exist, the doctrine being that where you have a "common interest you have a right to contribute to the defence. "It is, within my certain knowledge, and has been for many years, "a common practice that if a patentee attacks one manufacturer "the other manufacturers combine together to defend the case, "so that the whole expense shall not be thrown on the one that "is attacked. Otherwise, they might be attacked in detail, and "although it might be a bad patent, they might all lose their "cases owing to the great expense of defending them effectually."

In *Greig* v. *National Amalgamated Union of Shop Assistants, etc.*,[28] the union were held liable in an action for maintenance by an employer against whom an unsuccessful action for libel had been brought by the union in the name of a member whom the employer had dismissed. But the union had also maintained successful proceedings against the employer by the member for a week's salary, and as to this Lord Alverstone C.J. said[29]: "Rumins's original statement of complaint to the union was a "perfectly proper one, and, if the union had merely taken the "proper steps to protect his interest in recovering the wages "due, he did not think—though he would not actually decide "the question—that an action such as this would lie. The "original intervention of the union appeared to him to be "legitimate and justifiable, and no complaint could be made of "its action in assisting him to obtain his wages. So far the "matter was clear."

British Cash and Parcel Conveyors Ld. v. *Lamson Store Service Co. Ld.*[30] was a case of rival traders. The plaintiffs in the maintenance action had managed to obtain contracts for the use of their apparatus (for transmitting cash in a shop) with two former customers of the defendants and a third customer who alleged that he contracted with the plaintiffs by mistake. The plaintiffs' apparatus proved unsatisfactory, and as a result the customers entered into contracts with the defendants, who gave them indemnities against proceedings by the plaintiffs. The plaintiffs claimed that this amounted to unlawful maintenance by the defendants. It was held by the Court of Appeal that in giving these contracts of indemnity the defendants were acting

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[28] (1906) 22 T.L.R. 274.

[29] Ibid. 275.

[30] [1908] 1 K.B. 1006.

1954

MARTELL
v.
CONSETT IRON
CO. LD.

Danckwerts J.

in the legitimate defence of their commercial interests, and were not liable for maintenance. Lord Cozens-Hardy M.R. said[31]: "Beyond all doubt there was a time when what the defendants "did would have been regarded as criminal. But there is little "use in citing ancient text-books on this branch of the law. The "law has been modified in accordance with modern ideas of "propriety. The language of Lord Abinger in *Findon* v. "*Parker*[32] is explicit: 'The law of maintenance, as I under-"'stand it upon the modern constructions, is confined to cases "'where a man improperly, and for the purposes of stirring up "'litigation and strife, encourages others either to bring actions, "'or to make defences which they have no right to make.' And "in the 65 years which have elapsed since *Findon* v. *Parker*[32] "this principle has been carried even further. I may refer also "to *Fitzroy* v. *Cave*.[33] It is common knowledge that contracts "of indemnity are recognized and unquestionably valid, and none "the less because they may involve and indeed contemplate the "institution or defence of an action. The whole business of "marine insurance depends upon this. And perhaps the familiar "insurances against claims under the Workmen's Compensation "Acts are a still better example. In my opinion all that was "done by the defendants falls under and is protected by this "principle. The defendants had a business interest, a commercial "interest, which fully justified the indemnities or guarantees "which they gave."

There is also a very instructive passage in the judgment of Fletcher Moulton L.J.[34]: "The truth of the matter is that the "common law doctrine of maintenance took its origin several "centuries ago and was formulated by text-writers and defined "by legal decisions in such a way as to indicate plainly the views "entertained on the subject by the courts of those days. But "these decisions were based on the notions then existing as to "public policy and the proper mode of conducting legal proceed-"ings. Those notions have long since passed away, and it is "indisputable that the old common law of maintenance is to a "large extent obsolete. As pointed out by the present Master "of the Rolls in *Fitzroy* v. *Cave*,[35] the purchase of a chose in "action amounted to maintenance in the olden times, and there-"fore was not only a civil wrong, but a crime. Yet for hundreds

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[31] [1908] 1 K.B. 1006, 1012.

[32] 11 M. & W. 675, 682.

[33] [1905] 2 K.B. 364; 21 T.L.R. 612.

[34] [1908] 1 K.B. 1013, 1014.

[35] [1905] 2 K.B. 364.

"of years such transactions have been held valid, and the rights "arising out of them have been enforced by the courts of equity "and are now enforceable in all the courts of the realm. Similarly "in olden times it was maintenance to give evidence without "being subpoenaed so to do. To-day it is looked upon as part "of the duty of citizens to be ready and willing to assist the "administration of justice by giving evidence when they can do "so usefully. In the presence of changes such as these it "appears to me to be idle to look upon the courts as administering "the old common law as to maintenance. The present legal "doctrine of maintenance is due to an attempt on the part of "the courts to carve out of the old law such remnant as is in "consonance with our modern notions of public policy. The "position of the courts in this respect is not unlike that which "may be observed in their treatment of contracts in restraint "of trade, though the change of view with regard to maintenance "is far more complete. Speaking for myself, I doubt whether "any of the attempts at giving definitions of what constitutes "maintenance in the present day are either successful or useful. "They suffer from the vice of being based upon definitions of "ancient date which were framed to express the law at a time "when it was radically different from what it is at the present "day, and these old definitions are sought to be made service-"able by strings of exceptions which are neither based on any "logical principle nor in their nature afford any warrant that "they are exhaustive. These exceptions only indicate such cases "as have suggested themselves to the mind of the court, and "it is impossible to be certain that there are not many other "exceptions which have equal validity. A good example of "this is given by the case of *Holden* v. *Thompson*,[36] in which "Phillimore and Bray JJ., rightly in my opinion, accepted the "interest arising from community of religion as adequate justifi-"cation for a man assisting a co-religionist in a dispute relating "to religious matters, although such an exception is not made, "so far as I know, in any of the attempted definitions of main-"tenance. That there is still such a thing as maintenance in "the eye of the law and that it constitutes a civil wrong and "perhaps a crime is undoubted, and the general character of the "mischief against which it is directed is familiar to us all. It "is directed against wanton and officious intermeddling with the "disputes of others in which the defendant has no interest

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[36] [1907] 2 K.B. 489.

"whatever, and where the assistance he renders to the one or "the other party is without justification or excuse. But in my "opinion it is far easier to say what is not maintenance than to "say what is maintenance."

Buckley L.J. expressed similar views; he said[37]: "it is not "maintenance to uphold a party in litigation in whose result "the party accused of maintenance has a real and bona fide "interest"; and it is interesting to observe[38] that he treats *Plating Company* v. *Farquharson*[39] as an instance of the kind of common interest which prevents the support from amounting to maintenance. In the result, the members of the court were unanimous, and I do not find that the views expressed by them are in any way inconsistent with the decision of the House of Lords in *Neville* v. *London "Express" Newspaper Ld.*[40] or in any way affected by that decision.

A doctrine which was evolved to deal with cases of oppression should not be allowed to become an instrument of oppression, which it must be if humble men are not allowed to combine or to receive contributions to meet a powerful adversary. If it is right for members of a trade union to combine to assert the right of a trade unionist to his wages, and it is right for a number of manufacturers to combine to protect the freedom of an individual trader to make his goods, why is it wrong for persons whose livelihood or recreation will be adversely affected by pollution of waters to combine to defeat an aggression against the rights of one or more of them? What is the interest recognized by the law, and to be distinguished from "a sentimental interest," which exists in the cases of the trade unionists and the persons who carry on a similar trade, but does not exist in the case of persons who possess fishing rights or who wish to preserve the purity of the waters of the country's rivers or streams? In all these cases, persons combine, as Sir George Jessel said, lest they might be attacked in detail and they might all lose their cases owing to the great expense of defending them effectually. I agree with Lynskey J. in *Baker* v. *Jones*[41] in the view that the Legal Aid Acts show the change in public opinion on the question of supporting litigation. Even Lord Esher in *Alabaster* v. *Harness*[42] did not think that, apart from any specific law on the subject, there would necessarily be anything wrong in assisting another man in his litigation. The specific law to which he referred is now a collection of out-of-date rules which no longer fit the conditions of modern life and were based upon a conception of public policy which has long since become obsolete. No wonder public policy has been termed an "unruly horse": *per* Burrough J. in *Richardson* v. *Mellish*.[43] Of course, there can be abuses which the law must check. One is familiar with the former false "legal aid societies," usually consisting of one man, that supplied legal aid and advice for a percentage of the sum recovered. But the remedies of champerty and barratry should be competent to deal with that evil. Support of legal proceedings, based on a bona fide community of pecuniary interest or religion or principles or problems, is quite different and, in my view, the law would be wrong and oppressive if such support were to be treated as a crime or a civil wrong. But I do not believe that the law is in that condition.

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[37] [1908] 1 K.B. 1021.

[38] Ibid. 1020.

[39] 17 Ch.D. 49.

[40] [1919] A.C. 368.

[41] [1954] 1 W.L.R. 1005.

[42] [1895] 1 Q.B. 339.

It was said on behalf of the defendant company that the maintenance of the present action was oppressive to the defendant company. I do not see that it is any more oppressive than the angry reactions of the ants are to an elephant which knocks over an anthill. But what was meant, no doubt, was that if maintenance is a civil wrong and a crime, the unlawful support of an action against a party is oppressive. If, however, the support given is legitimate and is not a wrong, the maintenance of the action is not oppressive, and this ground of complaint disappears.

There is another point with which I will deal briefly. The suggestion that the support received by the plaintiffs in this action might fall within the range of charity was treated somewhat derisively on behalf of the defendant company; but I am not satisfied that a valid argument may not be put forward on behalf of the plaintiffs on this ground. Poverty is not based upon the standard of destitution, and in the cases upon charitable trusts it has long been recognized that charitable assistance may be provided for persons who are not among the poorest members of the community. It was argued that in the law of maintenance the exception of charity only permitted assistance in the most absolute case of poverty, where the litigant could not even initiate litigation at all without financial assistance. It seems to me peculiar if the rule is so strict as that, and I do not think the proposition is supported by the cases. In my view, this is a relative matter, which must depend upon the circumstances of the case. The Derwent Angling Association has some 150 members, and does not exclude rich men from membership, but the evidence was that the members in fact were miners and other persons earning about £8 per week or less, a class with sufficient means for their ordinary needs but not able to face the cost of a pollution action without outside assistance. The suggestion that they might form a fighting fund by putting aside a small sum each week out of their wages appears to me unreal and impracticable. Much was made of the position of Mrs. Martell, as a property owner, with a husband drawing the pay and allowances of a naval captain. Mrs. Martell was, in fact, it appears, only tenant for life, and did not receive much net income from the estate. The suggestion was, I think, that the estate might be mortgaged in order to raise the amount required to carry on the action—a somewhat bleak prospect for a property owner, it might be supposed. But, in any case, I do not think that it is right to regard Mrs. Martell as more than a nominal plaintiff in reality. The action was not of her seeking and she was only brought in, as a riparian owner, at the suggestion of the Anglers' Co-operative Association, and agreed to the use of her name on the terms that she should not become liable for costs. In these circumstances, I doubt whether Mrs. Martell's financial position is really relevant in considering the question of charity. But it is not necessary to consider the point further. Indeed, it may be that it is merely another aspect of the main question in the case.

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[43] (1824) 2 Bing. 229, 252.

In the result, I take the view that the support received by the plaintiffs in the carrying on of the action is not unlawful. This is enough to dispose of the application, and it is not really necessary for me to deal with the question whether an application for the stay of proceedings is an appropriate remedy (on the assumption that there is a case of unlawful maintenance). I will observe, however, that if it is a proper procedure, it is strange that no previous exercise of the jurisdiction of the court to stay proceedings in such a case can be produced. The case before Lord Loughborough is not such a case. There is a not unfavourable comment by Atkin L.J. in *Wild* v. *Simpson*,[44] and a passing reference to an injunction against the unlawful maintenance of proceedings by Lord Finlay in *Neville* v. *London "Express" Newspaper Ld.*[45] But I am not satisfied either that such jurisdiction exists in this kind of case or that it would be proper to stop proceedings at an early stage when, in the result, the applicant may turn out, by reason of the absence of damage, to have no cause of action for maintenance.

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[44] [1919] 2 K.B. 544; 35 T.L.R. 576.

[45] [1919] A.C. 368.

Finally, it was suggested that the bringing of a civil action with the support of the Anglers' Co-operative Association was improper and an abuse, because the Salmon and Freshwater Fisheries Act, 1923, and the Rivers (Prevention of Pollution) Act, 1951, provided for criminal proceedings, in connexion with which the question of unlawful maintenance could not arise. But the effectiveness of proceedings under these Acts has not been established, and the suggestion that the adoption of civil proceedings took place in the present case because the costs of such proceedings are more profitable to the legal profession is, I am satisfied, entirely unfounded and unworthy.

Accordingly, the application is dismissed with costs.

I. G. R. M.

The company appealed.

C. A.
1954–55
MARTELL
v.
CONSETT IRON
CO. LD.

Sir Andrew Clark Q.C. and *Kenneth Elphinstone* for the defendant company. The first plaintiff, Mrs. Martell, was clearly illegally maintained. She did not wish to litigate, and would never have done so but for the indemnity given to her by the trustee company. She was brought in by the other plaintiffs because as a riparian owner she would not have to prove special damage, and it was the A.C.A. which instigated the other plaintiffs to procure her to join in the action. Danckwerts J. ought to have drawn a distinction between her and the other plaintiffs, but he did not do so. Both she and the other plaintiffs were illegally maintained, and if either was so, the court will, of its own motion and without the necessity for any application by the injured party, stay all further proceedings until the action has been purged of all taint of illegal maintenance.

In dismissing the defendants' application for a stay, on the ground that there was a sufficient common interest between the association and the plaintiffs to justify the maintenance, Danckwerts J. did not sufficiently appreciate the weight of the authorities which are binding on this court, in which the modern limits of the common law tort and crime of maintenance were laid down and codified, namely, *Alabaster* v. *Harness* [1] and *Oram* v. *Hutt*,[2] which were impliedly approved by the House of Lords in

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[1] [1895] 1 K.B. 339; 11 T.L.R. 96.

[2] [1914] 1 Ch. 98; 30 T.L.R. 55.

Neville v. *London "Express" Newspaper Ld.*[3] Danckwerts J., it is submitted, misunderstood *Neville's* case[3] in saying, as he did, that Lord Finlay did not consider the amount or nature of the common interest justifying maintenance; for Lord Finlay did so,[4] and approved the principle that the essence of the offence is intermeddling with litigation in which the intermeddler has no concern unless the case falls under one of the settled exceptions. Moreover, the judge also adopted part of the speech of Lord Shaw of Dunfermline,[5] which was disapproved by a majority of the House and should not have been relied on. In any event, the two Court of Appeal decisions (supra) have never been overruled, and it is wrong to examine other or earlier cases in which there may be dicta suggesting that the law is wider or narrower than there stated. It is immaterial that they were both concerned with maintenance of the peculiarly personal actions of libel or slander; for what those cases decided was that the "common "interest" which will justify maintenance must be a legal, as opposed to a sentimental or aesthetic interest. It is impossible in the present case to find between the A.C.A. and the plaintiffs a common interest which the law would recognize as sufficient. The association is a loose informal body of persons interested in the purity of waters. Membership is open to any body who pays the subscription; and even now appeals are being addressed to the general public to donate funds to assist the present litigation. Yet there is no obligation on the association to assist a member in litigation; no member has a right to be indemnified by the association if he brings an action in defence of his legal rights; it is the association alone which decides whether or not to undertake specific litigation. Thus the association has none of the characteristics of a mutual protection society, such as might conceivably be claimed for certain professional organizations or for trade unions, whose members might be shown to have a common interest in the subject-matter of a particular member's suit sufficient to justify supporting it.

Danckwerts J. was also mistaken in saying that in *Skelton* v. *Baxter*[6] it was held that an approved society could properly maintain a workman; all that was there said was that giving an indemnity in the circumstances of that case might or might not be maintenance. The judge also relied on the decision in *Plating*

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[3] [1919] A.C. 368; 35 T.L.R. 167.

[4] [1919] A.C. 368, 382.

[5] Ibid. 414.

[6] [1916] 1 K.B. 321, 325, 326; 32 T.L.R. 130.

Co. v. *Farquharson* [7] as showing what would constitute a common interest; but, it is submitted, that was not an action on maintenance. There the advertisement which the defendants instigated was addressed to all nickel manufacturers inviting them to contribute to the cost of litigation in which all nickel manufacturers had a common business interest—for the law recognizes patents as a legal interest.

[HODSON L.J. But the advertisement inviting subscriptions was not addressed to a defined class; it extended to all nickel-platers in the world.]

The court said that the appeal was confined to manufacturers; and in any event that appeal was very different from the appeal of the A.C.A. in the present case, which is addressed to the public at large. Even if the decision in the *Plating Company* case [7] is applicable to the law of maintenance, the common interest there was sufficient in law. Similarly *British Cash and Parcel Conveyors Ld.* v. *Lamson Store Service Co. Ld.*,[8] an action alleging illegal maintenance, is distinguishable from the present case, because there was there a sufficient direct legal and financial common interest; but the passages in that case mainly relied on by Danckwerts J. were dicta by Fletcher-Moulton L.J.,[9] founded on a completely fallacious reading of the judgment in *Holden* v. *Thompson*.[10] The ratio decidendi in the *British Cash* case [11] was that the maintainers were in the position of insurers with a direct personal interest in the result of the suit, which would affect their purse and pocket. That is not the position of A.C.A. or of the trustee company.

It is conceded that the doctrine of illegal maintenance, which in its origin was founded in public policy, was once much wider than it is today; but the present limits laid down in *Alabaster* v. *Harness* [12] and *Oram* v. *Hutt* [13] now constitute a rule of law. It cannot be said, as Danckwerts J. said, that because the doctrine works hardship it can be discounted. The judge has strained the law because he thinks that it would be unjust if these actions for pollution were held to be illegally maintained; but he was not entitled to take into consideration changes in public policy between 1918, when *Neville's* case [14] was decided, and 1954: compare the observation of Lord Goddard C.J. in the argument on public policy in *Terrell* v. *Secretary of State for the Colonies* [15] that if there is a rule of law it is the duty of the court to administer it, independently of how it arose.

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[7] (1881) 17 Ch.D. 49.
[8] [1908] 1 K.B. 1006.
[9] Ibid. 1013–4.
[10] [1907] 2 K.B. 489.
[11] [1908] 1 K.B. 1006.
[12] [1895] 1 Q.B. 339.
[13] [1914] 1 Ch. 98.
[14] [1919] A.C. 368.

If it is to be said that the Legal Aid Act of 1949 has introduced a novel conception, namely, the principle of State aid for litigation, it becomes more important than ever to ensure that private individuals do not finance a multiplicity of actions. The only effect which the Act of 1949 may have had on the settled law of maintenance as a crime and a tort is that it has completely destroyed the exception as to charity, which Danckwerts J. thought might apply in the present case because of the relative poverty of the plaintiffs in comparison to the cost of a pollution action and the wealth of the defendant company.

[JENKINS L.J. It might, on the contrary, be said that as the legal aid legislation has given statutory endorsement to the view that no man ought to be deprived of his right to litigate by lack of means, it cannot now be unlawful for private citizens out of their own pockets to do what the Act says is right and proper.]

The reason why it cannot be done is that there is a well-established rule of law against it. If, as is submitted, the plaintiffs are being illegally maintained, the court can decide that question in their presence, despite the fact that the alleged maintainers, the tortfeasors and criminals, namely, the A.C.A. and the trustee company, are not before the court; for the plaintiffs are participes criminis in a continuing tort and crime which the court ought to stay if satisfied that the acts complained of constitute illegal maintenance.

[JENKINS L.J. If the defendants should succeed here and in the House of Lords, in proceedings to which the A.C.A. is not a party, and could then prosecute the A.C.A., the decision in the House of Lords would inevitably be an authoritative exposition of the law in regard to the particular facts, which would be binding on all the inferior courts, including the criminal courts. That would in effect be trying in absentia a person accused of a crime, would it not?]

In so far as it is a decision in law there can be no objection. In so far as it is a decision on the particular facts, it would not be admissible in evidence before a criminal court. In any event the court has power to bring the A.C.A. and the trustee company before it under Ord. 58, r. 2. No relief is sought against them here.

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[15] [1953] 2 Q.B. 482, 488; [1953] 2 All E.R. 490.

[Counsel referred to the statutory remedies open to the plaintiffs by way of criminal prosecutions under the Rivers (Prevention of Pollution) Act, 1951, and the Salmon and Freshwater Fisheries Act, 1923.]

Charles Russell Q.C. and *G. C. Newsom* for the plaintiffs. The court is being asked to convict of a crime in their absence persons, namely, the A.C.A. and the trustee company, who have been held "not guilty" by the decision of Danckwerts J., for he has decided against the defendants on each of the matters for the court's consideration, namely, (i) Is someone committing the indictable offence of unlawfully maintaining the plaintiffs' action? (2) If yes, is there jurisdiction in the court to stay the proceedings, although the action is that of the plaintiffs alone and although proof of illegal maintenance is no defence to an action? (iii) If yes, should the jurisdiction be exercised?

It is submitted that there is nothing illegal in 1954 in a bona fide association, such as is the A.C.A., formed for genuine purposes, using the funds of its members to aid one, or some of those members, in litigation of a matter to which members, whether as plaintiffs or defendants, are peculiarly susceptible. There is between the members a common bond of vulnerability to an enemy who might, unless there was combination against him, defeat them individually. There is no case which has decided that it is illegal to combine together to assist a member in litigation relevant to the common bond of vulnerability, and many indirect affirmations of its legality. No one has ever challenged the practice, which is universally known, of trade unions and professional bodies maintaining members' actions. It cannot be said that worker A has any legal interest in the result of an action by worker Z against his employer, worker Z being aided by the common trade union funds. Worker A's only interest is "It may be my turn next."

The defendants seek to rely on the literal wording of formulae laid down during the last sixty years, in cases where it has been held illegal to maintain actions for libel and slander, to support the contention that the maintainer must have almost a proprietary interest in "the thing at variance." It is submitted that the correct question is: Have the maintainers a legal interest, in the sense in which the law for the purposes of the law of maintenance requires an interest? That requires elucidation in each case; it is best not to endeavour to define what is a sufficient interest in general terms. A common bond of vulnerability is a sufficient interest: see *per* Lord Sumner in *Oram* v. *Hutt*,[16] impliedly approving mutual protection associations, and *per* Lord Parker of Waddington,[17] suggesting that giving legal aid to trade union members in protection of their interests might not always be illegal. Similarly in *Allen* v. *Francis* [18] Lord Cozens-Hardy M.R. said that a workman desiring to make a claim against his employer might be helped by "his trade union, or by his club, or an "approved society"; and in the most recent case on maintenance, *Baker* v. *Jones*,[19] Lynskey J. recognized the use of trade union funds in that way as permissible; while Lord Alverstone C.J. in *Greig* v. *National Amalgamated Union of Shop Assistants* [20] concluded that it would be legitimate to help a workman to recover his wages, while indirect blessing was given to the same contention in the argument in *Bobbey* v. *W. M. Crosbie* by Lord Cozens-Hardy M.R. and Swinfen Eady L.J.[21]

Although some among the quarter of a million members of the A.C.A. may have only a sentimental interest and may not be as vulnerable to pollution as are members who have property adjacent to, or are anglers in, the particular stream, it cannot be said that their presence converts support of such actions by the association into a crime. Nor is it correct to say that because members of the public make donations to the funds of the A.C.A., that makes its support of the plaintiffs criminal. The offence is that of maintaining a particular proceeding; the funds of the A.C.A. are used for many purposes.

The law of maintenance, which has its roots in public policy, cannot be immutable and has shown a continuous change from its earlier rigour. The drastic statutory alteration effected by the Legal Aid Act, 1949, shows that it is no longer regarded as desirable to restrain the access of subjects to Her Majesty's courts.

As to the exception of poverty or charity, the test of poverty in this connexion must be relative to the litigation in question. In pollution actions, which are extremely expensive, there is a large class outside the scope of legal aid who could not afford to bring such an action but might suffer by the offence of pollution. There is no recorded case of a legally aided pollution action, though in *Smeaton* v. *Ilford Corporation* [22] legal aid was granted to a plaintiff in an action over a burst sewer; but no expensive expert evidence was there required.

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[16] [1914] 1 Ch. 98, 106.

[17] Ibid. 105.

[18] [1914] 3 K.B. 1065, 1067.

[19] [1954] 1 W.L.R. 1005; [1954] 2 All E.R. 553.

[20] (1906) 22 T.L.R. 274, 275.

[21] (1915) 84 L.J.K.B. 856, 858.

[22] [1954] Ch. 450; [1954] 1 All E.R. 923.

As to the exercise of the jurisdiction to stay, such a procedure has never been suggested as the proper course, apart from the speculation obiter of Atkin L.J. in *Wild* v. *Simpson*,[23] even where an action is being unlawfully maintained, though it might have been appropriate in many cases, such as *Skelton* v. *Baxter*[24]; but in that case it was plainly stated that the fact that an action is being illegally maintained is no defence to the action itself.

In the present case the court is asked to stop the plaintiffs from asserting their legal rights against the defendants. The process of the court is being used for a lawful object by the plaintiffs, and for that reason alone the present case is distinguishable from *Wallis* v. *Duke of Portland*,[25] where it was an essential part of the plaintiff solicitor's case that he should assert a contract which was illegal because it was tainted with maintenance; the court there had to take note of the illegality. That is not this case. In *Elborough* v. *Ayres*,[26] where an action was being unlawfully maintained in a common law court, the defendant brought a bill in equity for an injunction. The court in equity refused to intervene, and Sir W. M. James V.-C. said that if Mr. Ayres' action was being illegally assisted, it would have been no ground for interference by that court to prevent the action going on[27]; thus the court clearly did not think that there had been any abuse of its process.

[JENKINS L.J. That is useful, for a stay would be equivalent to an injunction in a Court of Chancery.]

The case supports the submission that this procedure is not applicable. It is not right that there should be, either at the instance of the defendants or the court, that which is equivalent to a defence to the action. It is difficult to see how in practice the court could stay an illegally maintained action other than by making it necessary for the whole action to be started afresh.

G. H. Newsom following. As regards the alleged efficacy and cheapness of the statutory remedies, neither under the Salmon and Freshwater Fisheries Act, 1923, nor under the Rivers (Prevention of Pollution) Act, 1951, are the penalties sufficient to be effective against a wealthy company. Though the Act of 1923 imposes a penalty of imprisonment for a third offence, there

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[23] [1919] 2 K.B. 544, 564; 35 T.L.R. 576.

[24] [1916] 1 K.B. 321.

[25] (1797) 3 Ves.Jun. 494.

[26] (1870) L.R. 10 Eq. 367.

[27] Ibid. 373.

C. A.
1954–55

MARTELL
v.
CONSETT IRON
CO. LD.

is no case on record of directors being sent to prison; and under the Act of 1951 the offence defined in section 2 (1) must be proved strictly by a mass of scientific evidence, which may be more costly than in any civil action, for in civil actions samples of effluent are sometimes admitted. Moreover, the remedy by injunction requires the co-operation of the river boards, and both Vaisey J. in *Brocket* v. *Luton Corporation*[28] and Harman J. in *Pride of Derby and Derbyshire Angling Association* v. *British Celanese Ld.*[29] have spoken with some harshness of the attitude of river boards to pollution actions. Even if prosecutions were practicable and convictions could be secured, the civil remedy in damages, though not so important as the injunction, may still be necessary, since the river must be restocked with fish after the pollution has been stopped.

Sir Andrew Clark Q.C. in reply. *Elborough* v. *Ayres*[30] does not assist the plaintiffs on the point of procedure by way of application for a stay. It is not authority for showing that the court did not think it necessary to intervene. The case took place before the fusion of law and equity, and all that was said was that it would not be right for a court of equity to interfere in a court of common law.

Cur. adv. vult.

JENKINS L.J. stated the facts as set out above and continued: The company's case, as opened by Sir Andrew Clark, was to the effect, first, that the instigation by A.C.A. of the joinder of Mrs. Martell as a plaintiff in the action amounted to illegal maintenance of the action by A.C.A. so far as Mrs. Martell was concerned, and, secondly, that the giving of the two indemnities of October 29, 1951, by the trustee company amounted to illegal maintenance of the action by A.C.A. and/or the trustee company as regards all the plaintiffs. The separate allegation of illegal maintenance quoad Mrs. Martell, as distinct from the remaining plaintiffs, can be shortly disposed of. In my view, it is plain that if all A.C.A. had done had been to advise the Derwent Angling Association to procure the joinder of Mrs. Martell as a co-plaintiff with their trustees, there could, as the law now stands, be no sufficient ground for holding that in so doing A.C.A. had been guilty of illegal maintenance. Moreover, the separate allegation of illegal maintenance quoad Mrs. Martell adds nothing to the company's case, for if the trustee company was not acting illegally in giving the two indemnities of October 29, 1951, a fortiori A.C.A. were not acting illegally in advising the joinder of Mrs. Martell, while conversely if the giving of the two indemnities did amount to illegal maintenance quoad all the plaintiffs, or, for that matter, quoad Mrs. Martell as distinct from the others, the question whether the giving of the advice as to the joinder of Mrs. Martell could also be held to amount to illegal maintenance quoad Mrs. Martell would be immaterial.

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[28] [1948] W.N. 352.

[29] [1952] 1 T.L.R. 1013; [1952] 1 All E.R. 1326; [1952] W.N. 227.

[30] L.R. 10 Eq. 367.

One other preliminary point requires notice. The two indemnities were given, not by the unincorporated association A.C.A., but by its trustee company, the A.C.A. Trustee Company Ld. The trustee company is, of course, a distinct legal entity. But the argument for the defendant company did not, as I understood it, seek to draw any distinction on this ground with a view to excluding the trustee company from the benefit of any justification A.C.A. might have had for giving the indemnities if they had been given by A.C.A. itself. In other words, I take it to be accepted on the part of the defendant company that for the present purpose A.C.A. and the trustee company should, in effect, be treated as one, so that if what was done by the trustee company could have been lawfully done by A.C.A., it should equally be regarded as lawfully done by the trustee company. At all events, I think this is, for the present purpose, the right way of treating the relationship between the trustee company and A.C.A. The trustee company is, as I understand the facts, wholly owned by A.C.A. and was formed and is operated by A.C.A. simply and solely as an instrument to facilitate the carrying out of the objects and purposes of A.C.A.

These preliminary matters being out of the way, the substantial arguments presented by Sir Andrew Clark for the company may be thus summarized: (i) Maintenance is a common law misdemeanour punishable by fine and imprisonment. It is also at common law a tort actionable by any person who can show he has suffered damage thereby. It is also a crime under various ancient statutes, but for the present purpose no reliance is placed on its character as a statutory offence as distinct from a misdemeanour at common law. (ii) With the exceptions mentioned below, the crime and tort of maintenance is committed by any person who gives financial support to the plaintiff or defendant in any action to which that person is not a party. (iii) There are certain specific exceptions to this general rule, of which the only one that could conceivably be suggested as having any relevance here is the exception allowed in favour of a person who, out of charity, supports a poor man in the prosecution or defence of a suit. It is, however, submitted that this exception is not available to A.C.A. or the trustee company in the present case. Mrs. Martell is plainly not an object of charity. The members of the Derwent Angling Association are, no doubt, persons of limited means, but the assistance given to them in the present action cannot properly be held to be charitable within the meaning of the exception, which should, it is submitted, be confined to cases where the assistance given can fairly be brought within the head of legal charity comprising the relief of poverty. Even if the members of the Derwent Angling Association might, by reference to their individual resources, be classed as " poor " so as to bring within this exception the giving of assistance to them individually in the prosecution or defence of some kinds of actions, the object of the present action is not to relieve them individually in any matter touching their necessities of life or means of livelihood, but merely to preserve their collective enjoyment of a particular form of recreation. (iv) Apart from the specific exceptions, maintenance by a third party of the prosecution or defence of an action can only be excepted from the general condemnation of maintenance as a criminal and tortious act if the maintainer has an interest in the action. But authorities binding on this court show that the interest required in order to bring a case within this exception is " an " actual valuable interest in the result of the suit itself," or " an interest recognized by the law in the subject-matter of the " action or some issue between the parties to the action." The members of A.C.A., other than the plaintiffs in the present action, have not, either individually or collectively, any such interest in the present action. (v) It follows that A.C.A. and the trustee company are, in relation to the present action, guilty of the crime and tort of maintenance. (vi) It follows, further, that the court should stay all further proceedings in the action until it is purged of all taint of maintenance; for the court should not lend itself to proceedings which owe their origin and continuance to a crime, and which are, as such, an abuse of the court's process, besides being vexatious and oppressive to the defendant company as the party against whom the criminal act is directed.

The earlier authorities on this curious branch of the law are reviewed in the judgment of Lord Coleridge C.J. in the famous case of *Bradlaugh* v. *Newdegate*,[1] and I do not propose to refer to them at length. It is, however, worth noting that whereas in *Wallis* v. *Duke of Portland*,[2] one finds Lord Loughborough L.C. roundly declaring that[3] "maintenance is not *malum pro-* "*hibitum*, but *malum in se*: that parties shall not by their "countenance aid the prosecution of suits of any kind; which "every person must bring upon his own bottom and at his own "expense," and qualifying this general statement only by reference to the established specific exceptions, Lord Abinger in *Findon* v. *Parker*,[4] uses much less sweeping language. "The "law of maintenance," says Lord Abinger, "as I understand "it upon the modern constructions, is confined to cases where a "man improperly, and for the purpose of stirring up litigation "and strife, encourages others either to bring actions, or to make "defences which they have no right to make." It will be seen that this definition makes impropriety in the motive or purpose of the maintainer an essential element in the offence. The same notion appears in other definitions noticed by Lord Coleridge C.J. in *Bradlaugh* v. *Newdegate*.[5] Thus Blackstone is there cited as calling maintenance " ' an officious intermeddling in a " ' suit which no way belongs to one by maintaining or assisting " ' either party with money or otherwise to prosecute or defend " ' it ': (Bl. Comm. book iv, c. 10, s. 12) and Story as terming it " ' the officious assistance by money or otherwise, proffered by a " ' third person to either party to a suit, in which he himself has " ' no legal interest, to enable them to prosecute or defend it ' " (Story on Contract, ch. vii, s. 578).

On the authorities as they now stand, I think that Lord Loughborough's general condemnation of all aid by third parties in suits of any kind, except in cases falling within one or other of the established specific exceptions, must be regarded as too wide, while Lord Abinger's more cautious definition of the offence as confined to cases where there is some impropriety of motive or purpose on the part of the maintainer must be regarded as too narrow. In the present state of the authorities, the right view appears to be that the crime of maintenance is committed whenever a third party aids the prosecution or defence of an action in the absence of circumstances sufficing in law to justify the giving of such aid, whatever the motive or purpose of the person giving such aid may have been, the element of impropriety

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[1] (1883) 11 Q.B.D. 1.

[2] (1797) 3 Ves.Jun. 494.

[3] Ibid. 502.

[4] (1843) 11 M. & W. 675, 682.

[5] 11 Q.B.D. 1, 5–6.

C. A.
1954–55

Martell
v.
Consett Iron
Co. Ld.

Jenkins L.J.

or officious intermeddling being supplied by the fact of interference in the suit by giving aid to one party or the other, coupled with the absence of legal justification for so doing; while, on the other hand, the giving of such aid will not be criminal if it is justifiable in law by reference to one of the specific exceptions, the existence of which I have already noticed, or if the person giving such aid has such an interest in the action as can be held in law sufficient to justify him in giving it.

This, I think, appears from the judgment in *Bradlaugh* v. *Newdegate* itself, where Lord Coleridge said[6]: "It results, I "conceive, from all these cases, and the number might be largely "increased, that to bind oneself after the commencement of a "suit to pay the expenses of another in that suit, more "especially if that other be a person himself of no means, and "the suit be one which he cannot bring, is still, as it always "was, maintenance; and that for such maintenance an action "will lie. It is said, however, that this general statement "requires two qualifications: first, that the acts of the main-"tainer must be immoral, and that the maintainer must have "been actuated by a bad motive; next, that if he has, or believes "himself to have, a common interest with the plaintiff in the "result of the suit, his acts, which would otherwise be main-"tenance, cease to be so." Then, on the question of bad motive, he said, referring to the decision of the Privy Council in *Fischer* v. *Kamala Naicker*[7]: "The words are remarkable 'it "'(i.e., maintenance), must be something against good policy "'and justice, something tending to promote unnecessary litiga-"'tion, something that *in a legal sense* is immoral, and to the "'constitution of which a bad motive *in the same sense* is "'necessary.'" "The decision of the House of Lords," he continued, "shows, I think, that Mr. Newdegate's conduct was "against good policy and justice, and tended to promote unneces-"sary litigation—but what is immoral *in a legal sense*? What "*in a legal sense* is a bad motive? It is not perhaps quite easy "to say"; and a little further on he said[8]: "At least in any "view it must mean as much as this, that to do what is illegal is "legally immoral, and that a motive which impels to an illegal "act is legally a bad motive. In this sense I do not hesitate "to call Mr. Newdegate's conduct immoral and his motive bad."

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[6] 11 Q.B.D. 1, 9.
[7] (1860) 8 Moo.Ind.App. 170, 187.
[8] 11 Q.B.D. 1, 10.

On the question of common interest, he said[9]: "It is said, "however, that the defendant had or believed that he had a "common interest with Mr. Clarke in the result of the suit, and "that, therefore, his finding Mr. Clarke the whole money for the "litigation was not maintenance. As a general rule there is no "doubt that such common interest, believed on reasonable "grounds to exist, will make justifiable that which would other-"wise be maintenance. The oldest authorities, authorities which "hold a multitude of things to be maintenance which would not "be held so now, all lay down this qualification. Brooke, Fitz-"herbert, Rolle, Hawkins, Viner, Comyns, to cite no more, all "concur in this. Buller J. in his celebrated judgment in *Master* "v. *Miller*[10] strongly insists upon it. But then the instances "they give show the sort of interest which is intended. A "master for a servant, or a servant for a master; an heir; a "brother; a son-in-law; a brother-in-law; a fellow commoner "defending rights of common; a landlord defending his tenant "in a suit for tithes; a rich man giving money to a poor man "out of charity to maintain a right which he would otherwise "lose. But in all these cases the interest spoken of is an actual "valuable interest in the result of the suit itself, either present, "or contingent, or future, or the interest which consanguinity or "affinity to the suitor give to the man who aids him, or the "interest arising from the connexion of the parties, e.g., as "master and servant, or that which charity and compassion "give a man in behalf of a poor man who, but for the aid of "his rich helper, could not assert his rights, or would be "oppressed and overborne in his endeavour to maintain them."

I should next refer to *Alabaster* v. *Harness*,[11] on which Sir Andrew strongly relies. This was an action for maintenance brought by the proprietors of a newspaper in respect of an action for libel unsuccessfully brought by one Dr. Tibbits against the plaintiffs, at the instigation and with the financial assistance of the defendants, one Harness and a company of which he was managing director. The defendants had employed Dr. Tibbits to report as an expert on certain electrical appliances for the treatment of disease in the sale of which the defendants were interested, and he had reported favourably thereon. The alleged libel was contained in an article commenting adversely on the report, and casting serious reflections on Dr. Tibbits' qualifications as an expert and on his conduct and that of the defendants in connexion with the report and the sale of such appliances. The company having gone into liquidation, the maintenance action proceeded against the defendant Harness alone. It was contended on behalf of the defendant Harness that the maintenance action should fail on the ground that the case fell within [12] "a well-established exception from the rule against "maintenance, inasmuch as the defendant Harness had a com-"mon interest with Dr. Tibbits in the result of the action by "the latter," because the article complained of therein attacked Harness as well as Dr. Tibbits. It was also contended for Harness [13] "that the result of the authorities is that a belief on "reasonable grounds in the existence of a common interest is "sufficient to justify maintenance, although no interest recog-"nized by law exists," and that, in order to constitute maintenance, there must be a mens rea, something in the nature of an immoral motive. The Court of Appeal, affirming Hawkins J., rejected both these contentions. Lord Esher M.R. said [14]: "The "doctrine of maintenance, which appears in the Year Books, and "was discussed briefly by Lord Loughborough in *Wallis* v. *Duke* "*of Portland*,[15] and more elaborately by Lord Coleridge C.J. in "*Bradlaugh* v. *Newdegate*,[16] does not appear to me to be "founded so much on general principles of right and wrong or "of natural justice as on considerations of public policy. I do "not know that, apart from any specific law on the subject, "there would necessarily be anything wrong in assisting another "man in his litigation. But it seems to have been thought that "litigation might be increased in a way that would be mis-"chievous to the public interest if it could be encouraged and "assisted by persons who would not be responsible for the conse-"quences of it, when unsuccessful. Lord Loughborough, in "*Wallis* v. *Duke of Portland*,[17] says that the rule is"—then he cited the passage which I have already quoted, and went on: "But the law from the earliest times has countenanced some "relaxation of the utmost strictness of that rule; and some par-"ticular cases have been specifically allowed as constituting "excuses for that interference in the suit of another which would "otherwise have amounted to maintenance. There are some "cases in which a landlord has been allowed to maintain his "tenant in a litigation. It matters not, as it appears to me, for "what reason this exception was made. It must be treated

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[9] 11 Q.B.D. 1, 11.

[10] (1791) 4 T.R. 320.

[11] [1895] 1 Q.B. 339; 11 T.L.R. 96.

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[12] [1895] 1 Q.B. 339, 340.

[13] Ibid. 341.

[14] Ibid. 342–3.

[15] 3 Ves.Jun. 494, 501–2.

[16] 11 Q.B.D. 1, 9 et seq.

[17] 3 Ves.Jun. 494, 501–2.

" now as an exception founded upon specific authority, which all " courts have adopted on the strength of that authority. Then " there is the exception which has been made on the ground of " charity. There are other exceptions. All of them are exceptions which from early times have been specifically allowed, " and which have been carried into the textbooks on the subject; " but, if a case is not within any one of these specific exceptions " established by authority, it seems to me difficult to say otherwise than that it must fall within the strict rule. If, however, " it is open to us to go beyond the exceptions which have been " specifically allowed, I should adopt the rule indicated as the " result of the cases by Lord Coleridge C.J. in *Bradlaugh* v. " *Newdegate*." [18]

Then Lord Esher quoted the passage from Lord Coleridge's judgment, to which I have already referred, and he continued: [19] " The present case is clearly not within the grounds of exception " there mentioned by Lord Coleridge, and it is within the general " rule enunciated by Lord Loughborough in *Wallis* v. *Duke of* " *Portland*.[20] I am not disposed to extend the exceptions from " the rule against maintenance, and the present case appears to " me to be as strong a case of maintenance as could be. The " defendant instigated an action, the verdict in which could not " affect him, on account of some fancied interest which was not " an interest at all. Adopting the test laid down by Lord " Coleridge C.J., I think that the only interest which could have " justified him in what he did would be some interest recognized " by the law in some matter at issue in the suit. The defendant " had no such interest. For these reasons, I think the appeal " must be dismissed."

Lopes L.J. said [21]: " It is said that in this case the defendant " was justified in his maintenance of Dr. Tibbits' action because " he had a common interest with him. In my opinion, he had " no such common interest as could justify his interference in " the action. In order to justify such interference on the ground " of common interest, I think there must be some interest " recognized by the law in what is called by Hawkins in his " Pleas of the Crown ' the thing in variance '; by which I understand an interest in the subject-matter of the action at issue " between the parties. In my opinion, there must be some " legal, as distinguished from a sentimental, interest in the result

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[18] 11 Q.B.D. 1, 11.

[19] [1895] 1 Q.B. 339, 343

[20] 3 Ves.Jun. 494.

[21] [1895] 1 Q.B. 339, 344.

C. A.

1954–55

Martell
v.
Consett Iron
Co. Ld.

Jenkins L.J.

"of the action about to be tried, or in some question at issue "between the parties in the action. The matter in issue in the "action brought by Dr. Tibbits was whether the plaintiffs had "libelled him. No question arose as between the defendant and "the plaintiffs. It seems to me that it would be strongly against "public policy that in such a case persons who have no interest "whatever in the action, and who cannot be affected by the "verdict in it, or made liable to pay costs, should be allowed "to assist another person in maintaining it against the plaintiffs, "as the defendant has done. The ground on which the "defendant's conduct was sought to be justified was, as I have "said, the existence of a common interest. There are no doubt "other cases recognized by the law as exceptions from the rule "against maintenance, such as those of consanguinity, affinity, "charity, and the relation of master and servant, none of which "are here in question. These are exceptions which have been "long introduced and are well recognized; but I must say that I "should be sorry to see any new exceptions engrafted on the rule."

Rigby L.J. said [22]: "I do not feel called upon in this case to "attempt the difficult task of defining what constitutes main-"tenance. The general rule is clear and has been laid down "over and over again in the authorities on the subject. The "difficulty arises on account of the very various exceptions which "have been allowed by judicial decisions to be defences where "the general rule has been violated. I am unable to reduce "those exceptions to any simple rule. We were asked by the "defendant's counsel to say that the various exceptions from the "rule could all be accounted for by saying that a mens rea was "essential to maintenance, i.e., that there could be no infringe-"ment of the law against maintenance unless it was shown that "the particular defendant had done something which he knew to "be wrong; for it was argued that, though what he did was "really wrong, if he believed it to be right, it was enough. That "argument seems to me to go so far as to defeat itself. I am "content to express a general concurrence with the passage cited "by the Master of the Rolls from the judgment of Lord Coleridge "C.J., in *Bradlaugh* v. *Newdegate*,[23] with regard to what con-"stitutes an excuse for maintenance." Then later on he said [24]: "The present case appears to me to be a very clear case of "maintenance which does not fall within any of the exceptions

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[22] [1895] 1 Q.B. 339, 345.

[23] 11 Q.B.D. 1, 11.

[24] [1895] 1 Q.B. 339, 346.

"from the general rule against maintenance. I cannot accept "the contention that, whenever questions which affect a person "not a party to an action incidentally arise in the action, the "case falls within the exception from the rule as being one where "there is a common interest. In any case I should have grave "doubts whether a person who is really the author of the litigation could claim the benefit of an exception depending on the "fact that in an action which he has himself instigated certain "questions affecting him may incidentally arise."

Next in the sequence of Sir Andrew's argument, though not in order of date, comes the case in this court of *Oram* v. *Hutt.*[25] The question there was whether the payment by a trade union of the costs of a slander action brought by one of its officers who had been slandered by way of his office as well as personally was obnoxious to the law of maintenance and ultra vires; and it was held, following *Alabaster* v. *Harness*[26] and affirming Swinfen Eady J., that this question must be answered in the affirmative. Lord Parker of Waddington said[27]: "In my opinion Swinfen "Eady J. was bound and this court is bound to hold this agree"ment void unless this case can be distinguished from the case of "*Alabaster* v. *Harness.*[28] Several grounds of distinction were "suggested in argument, but upon consideration I think there is "little substance in them. A person who maintains the action "of another can only justify by proving the existence of a common "interest or bringing himself within certain recognized exceptions "to the common law rule. A common interest means an interest "recognized by law in the subject-matter of the action or some "issue between the parties to the action. It was decided in the "case in question that a libel action is a personal action which in "point of law concerns only the parties to it—the matters legally "at issue are merely whether the plaintiff has been libelled, and "if so to what damages he is entitled. The mere circumstance "that in the libel action there must or may arise questions of "fact in the determination of which a third party has an interest "will not constitute a common interest sufficient to justify main"tenance by such third party."

Lord Sumner said this[29]: "That the action of maintenance is "now in small favour and that indictments for maintenance have "been drawn by few among living men are nothing to the point. "Maintenance has not ceased to be a part both of the law of torts

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[25] [1914] 1 Ch. 98; 30 T.L.R. 55.

[26] [1895] 1 Q.B. 339.

[27] [1914] 1 Ch. 98, 104.

[28] [1895] 1 Q.B. 339.

[29] [1914] 1 Ch. 98, 106.

" and of the law of crimes." Then a little further on he said [29]: "There is no question here of the business of insurance or of "mutual protection associations. I think it makes no difference "to the validity of the payment whether the association paid Mr. "Johnson money for the action in advance, or paid him sums as "it proceeded, or promised to pay his bill of costs when it was "over and did so, thus giving effect to an unlawful contract. . . . "In this action it had no legal interest: to its fruits it had no "legal right; the wrong that that action was brought to vindicate "was no wrong done to the association." Then, a little further on again [29]: "They possessed identical causes of action; they had "a common aim, namely, the confutation of McNicholas and his "reduction to silence. But a common cause is not a common "interest. Victory for either would serve the other's turn. "Doubtless it did not much matter which sued, if one judgment "against McNicholas was obtained. Still their wrongs, their "causes of action, their damages, and their costs were all "separate. The association had no right to fight Mr. Johnson's "battles. *Alabaster* v. *Harness*,[30] in my opinion, so far as the "question of maintenance is concerned, covers this case." Warrington J. delivered a concurring judgment, in which he held the question to be concluded by the decision in *Alabaster* v. *Harness*.[30]

To complete the tale of authorities mainly relied on by Sir Andrew, I should next refer to *Neville* v. *London "Express" Newspaper Ld.*,[31] which concerned an action for maintenance brought by Neville against London Express Newspapers Ld. in briefly the following circumstances: In the course of developing certain land for sale in plots as a building estate, Neville induced large numbers of persons to contract for the purchase of plots by means of representations which London Express Newspapers stigmatized in their newspaper as fraudulent, offering at their own expense to take proceedings against Neville on behalf of any of the persons defrauded who sent in their names to the company's solicitors. In the result, proceedings financed by the company were successfully taken against Neville by a large number of persons. In the meantime, Neville brought an action for libel (with which we are not concerned) and maintenance against the company. Neville succeeded in this action in the court of first instance, but the Court of Appeal allowed an appeal by the company and ordered a new trial, and from that decision Neville appealed to the House of Lords. Two questions arose in the appeal, namely, (i) whether an action for maintenance would lie in the absence of proof of special damage, and (ii) whether the success in a maintained action of the party maintained was a bar to the right of action for maintenance. A majority of the House (Lord Finlay L.C. and Lords Shaw of Dunfermline and Phillimore, Viscount Haldane and Lord Atkinson dissenting) answered the first question in the negative. A differently constituted majority (Lord Finlay L.C., Viscount Haldane and Lord Atkinson, Lords Shaw of Dunfermline and Phillimore dissenting) answered the second question also in the negative. The nature of the two questions involved in the appeal was not such as to call for any critical examination of the character or degree of the interest in an action which a third party assisting the plaintiff or defendant in such action and not falling within any of the specific exceptions must possess in order to repel a charge of illegal maintenance. It was, I should have thought, as plain as it well could be that the company had no interest whatever in the actions brought against Neville by the defrauded purchasers, and equally plain that the company could not bring itself within any of the specific exceptions, though the exception in favour of charity seems to have been suggested. The points in the case were simply whether it was of the essence of the offence of maintenance not only that the maintaining party should have no interest in the action and not be within any of the specific exceptions, but also that the maintained party should be found to have had no valid claim or defence as the case might be; and further whether the offence of maintenance constituted an actionable tort without proof of special damage. The majority decision of the former point in a negative sense left the position regarding the definition of the crime of maintenance and in particular regarding interest in the action as an exculpation or defence available to a person charged with illegal maintenance substantially as it stood under the earlier authorities. The majority decision of the latter point in a negative sense prevents Sir Andrew at this stage from pointing to an actionable tort, but that does not materially affect his case. He could not prove the tort without proving the crime, which is the basis of the tort, and it is enough for the purposes of his argument if he can prove the crime. The support for Sir Andrew's argument afforded by *Neville* v. *London "Express" Newspaper Ld.*[31] is, I think, adequately summarized by saying (i) that it is a decision of a majority of the House to the effect that the success of the maintained action is no answer to a charge of illegal maintenance; (ii) that it confers the express or implied approval of a majority of the House on the decisions in *Alabaster* v. *Harness* [32] and *Oram* v. *Hutt.*[33] On the other hand, Mr. Russell, for the plaintiffs, can justly say that *Neville* v. *London "Express" Newspaper Ld.*[34] contains no indication of disapproval of the three cases to which I am about to refer.

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[29] [1914] 1 Ch. 98, 106.
[30] [1895] 1 Q.B. 339.
[31] [1919] A.C. 368; 35 T.L.R. 167.

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[31] [1919] A.C. 368.

In *Plating Company* v. *Farquharson,*[35] the question was whether the publishers of a newspaper were guilty of contempt of court in publishing, at the instance of defendants who were appealing from a judgment given against them in an action for infringement of a patent for nickel-plating, an advertisement inviting subscriptions from the trade towards the expense of the appeal, and offering a reward of £100 to anyone who could procure documentary evidence that nickel-plating had been done before 1869. The motion by the plaintiffs to commit the publishers for contempt was made on the ground that the advertisements tended to interfere with the course of justice, but in dealing with that general allegation it was necessary for the court to consider whether there was any impropriety in the solicitation by the defendants by means of such advertisements of financial support from the trade in the prosecution of their appeal. In other words, it was, I think, necessary for the court to consider, in effect, whether in publishing such advertisements the publishers were lending themselves to the solicitation by the defendants of illegal maintenance. Sir George Jessel M.R., in the course of his judgment refusing the motion, in which the other members of the court concurred, said [36]: " All the trade is interested in freeing the trade " from monopoly of any kind, whether by patent or otherwise; " and we know that it is customary for the members of a trade to " combine for that purpose, on the same principle that people " claiming a right of common are allowed to combine to assist a " defendant who is interfered with by the lord, on the ground that " right of common does not exist, the doctrine being that where " you have a common interest you have a right to contribute to " the defence. It is, within my certain knowledge, and has been " for many years, a common practice that if a patentee attacks " one manufacturer the other manufacturers combine together to " defend the case, so that the whole expense shall not be thrown

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[32] [1895] 1 Q.B. 339.

[33] [1914] 1 Ch. 98.

[34] [1919] A.C. 368.

[35] (1881) 17 Ch.D. 49.

[36] Ibid. 54.

"on the one that is attacked. Otherwise, they might be attacked "in detail, and although it might be a bad patent, they might all "lose their cases owing to the great expense of defending them "effectually."

In *Greig* v. *National Amalgamated Union of Shop Assistants*,[37] the plaintiff had dismissed an employee of his named Rumins who was a member of the defendant union, and the union had brought proceedings in Rumins' name against the plaintiff for a week's salary due to Rumins and for damages in respect of an alleged libel on Rumins by the plaintiff. The claim for the week's salary succeeded, but the claim for damages for libel failed. The plaintiff thereupon sued the defendant union for maintenance in respect of the claim for libel, and Lord Alverstone C.J. held the defendant union liable, but in the course of his judgment he said[38]: "Rumins's original statement of complaint "to the union was a perfectly proper one, and, if the union had "merely taken the proper steps to protect his interest in recovering the wages due, he did not think—though he would not "actually decide the question—that an action such as this "would lie. The original intervention of the union appeared to "him to be legitimate and justifiable, and no complaint could "be made of its action in assisting him to obtain his wages. "So far the matter was clear."

In *British Cash and Parcel Conveyors Ld.* v. *Lamson Store Service Co. Ld.*,[39] the defendants, who were manufacturers of cash-conveying equipment for use in shops, secured business from customers of a rival concern on terms that the defendants would indemnify these customers from, and support their defence of, any action brought against them in respect of any breach of their contracts with the rival concern involved in their so transferring their custom. Actions were in fact brought by the rival concern against the customers concerned and the defendants paid the damages and costs payable by the customers as they had agreed to do. The rival concern then brought an action for illegal maintenance against the defendants, and the Court of Appeal, reversing the decision of the trial judge who directed judgment to be entered for the plaintiffs for nominal damages and had granted an injunction, held that the action should be dismissed. Sir Herbert Cozens-Hardy M.R. said[40]: "Apart "from the injunction, we have had a very learned argument in

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[37] (1906) 22 T.L.R. 274, 275.

[38] Ibid.

[39] [1908] 1 K.B. 1006.

[40] Ibid. 1011–12.

"support of the view that the conduct of the defendants in the "three instances I have described gave the plaintiffs a common "law action for maintenance. I am unable to accept this contention. Beyond all doubt there was a time when what the "defendants did would have been regarded as criminal. But "there is little use in citing ancient textbooks on this branch "of law. The law has been modified in accordance with "modern ideas of propriety. The language of Lord Abinger in "*Findon* v. *Parker*[41] is explicit." Then he cited the passage to which I have already referred, and he continued[42]: "And in the "sixty-five years which have elapsed since *Findon* v. *Parker*[43] "this principle has been carried even further. I may refer also "to *Fitzroy* v. *Cave*.[44] It is common knowledge that contracts "of indemnity are recognized and unquestionably valid, and none "the less because they may involve and indeed contemplate the "institution or the defence of an action. The whole business "of marine insurance depends upon this. And perhaps the "familiar insurances against claims under the Workmen's "Compensation Act are a still better example. In my opinion "all that was done by the defendants falls under and is protected by this principle. The defendants had a business "interest, a commercial interest, which fully justified the "indemnities or guarantees which they gave. And on this short "ground I think the appeal must be allowed, and judgment "entered for the defendants."

Fletcher Moulton L.J. said[45]: "The truth of the matter is "that the common law doctrine of maintenance took its origin "several centuries ago and was formulated by text-writers and "defined by legal decisions in such a way as to indicate plainly "the views entertained on the subject by the courts of those "days. But these decisions were based on the notions then "existing as to public policy and the proper mode of conducting "legal proceedings. Those notions have long since passed away, "and it is indisputable that the old common law of maintenance "is to a large extent obsolete. As pointed out by the present "Master of the Rolls in *Fitzroy* v. *Cave*,[46] the purchase of a "chose in action amounted to maintenance in the olden times, "and therefore was not only a civil wrong, but a crime. Yet "for hundreds of years such transactions have been held valid, "and the rights arising out of them have been enforced by the

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[41] 11 M. & W. 675, 682.

[42] [1908] 1 K.B. 1006, 1012.

[43] 11 M. & W. 675.

[44] [1905] 2 K.B. 364.

[45] [1908] 1 K.B. 1006, 1013–4.

[46] [1905] 2 K.B. 364.

"Courts of Equity and are now enforceable in all the courts of "the realm. Similarly in olden times it was maintenance to "give evidence without being subpoenaed so to do. To-day it "is looked upon as part of the duty of citizens to be ready and "willing to assist the administration of justice by giving evidence "when they can do so usefully. In the presence of changes "such as these it appears to me to be idle to look upon the "courts as administering the old common law as to maintenance. "The present legal doctrine of maintenance is due to an attempt "on the part of the courts to carve out of the old law such "remnant as is in consonance with our modern notions of public "policy. The position of the courts in this respect is not unlike "that which may be observed in their treatment of contracts in "restraint of trade, though the change of view with regard to "maintenance is far more complete. Speaking for myself, I "doubt whether any of the attempts at giving definitions of "what constitutes maintenance in the present day are either "successful or useful. They suffer from the vice of being based "upon definitions of ancient date which were framed to express "the law at a time when it was radically different from what "it is at the present day, and these old definitions are sought to "be made serviceable by strings of exceptions which are neither "based on any logical principle nor in their nature afford any "warrant that they are exhaustive. These exceptions only "indicate such cases as have suggested themselves to the mind "of the court, and it is impossible to be certain that there are "not many other exceptions which have equal validity." Then after a reference to *Holden* v. *Thompson*,[47] which Sir Andrew criticizes on the ground that the Lord Justice mistakenly treated that case as having decided that community of religion constituted a sufficient common interest for the purposes of the law of maintenance, Fletcher Moulton L.J. continued[48]: "That there "is still such a thing as maintenance in the eye of the law and "that it constitutes a civil wrong and perhaps a crime is "undoubted, and the general character of the mischief against "which it is directed is familiar to us all. It is directed against "wanton and officious intermeddling with the disputes of others "in which the defendant has no interest whatever, and where "the assistance he renders to the one or the other party is without "justification or excuse. But in my opinion it is far easier to "say what is not maintenance than to say what is maintenance.

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[47] [1907] 2 K.B. 489.

[48] [1908] 1 K.B. 1006, 1014.

C. A.
1954–55

MARTELL
v.
CONSETT IRON
CO. LD.

Jenkins L.J.

"One point is clear. No transaction can constitute maintenance "if the court treats it as valid and enforces obligations under it."

The same Lord Justice, after referring to the undoubted validity of a wide variety of contracts of indemnity involving claims by and against third parties and the prosecution and defence of actions brought in respect of such claims and referring to the facts of the cases then before the court, said[49]: "In each "of these cases, therefore, we find a proper contract of indemnity "entered into by the defendants not wantonly or officiously, but "in the reasonable defence of their own trade interests. As I "have said, such contracts of indemnity are in no wise contrary "to law or tainted with invalidity. They do not necessarily "involve any action, for a claim may be settled by an adequate "offer being made and accepted, and an action becomes neces-"sary only in case the parties do not agree, a state of things "which may be due to the unreasonable conduct of the one or "the other party or of mistaken views of law or fact on their "part which prevent an agreement being arrived at."

Buckley L.J. said[50]: "The cases, I think, divide themselves "into two classes—the one where the person accused of main-"tenance has a common interest with the party to the litigation "(an instance of which is *Plating Co.* v. *Farquharson*[51]), and "the other where the party charged with maintenance has no "such interest, in which case he is guilty of maintenance unless "his case falls within certain exceptions which have from early "times been specifically allowed. The respondents pressed us "with an argument which I think was fallacious, that the party "accused of maintenance is guilty of an offence unless he falls "within some one of these exceptions, relying for that purpose "upon the judgment of Lord Esher in *Alabaster* v. *Harness*.[52] "The point in *Alabaster* v. *Harness* was that the action as to "which the question arose was an action for libel, and Lord "Esher commenced his judgment by pointing out that that was "a personal action which in point of law concerns only the "person who brings it. In other words, it was one of the class "of cases in which there was no common interest and in which "maintenance was established if the case did not fall within "one of the specific exceptions. That does not in any way affect "the proposition, which I think is true, that it is not maintenance "to uphold a party in litigation in whose result the party accused

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[49] [1908] 1 K.B. 1006, 1016–7.
[50] Ibid. 1020–21.
[51] 17 Ch.D. 49, 54.
[52] [1895] 1 Q.B. 339, 343.

"of maintenance has a real and bona fide interest. I do not "think it necessary to go in detail into the facts of the present "case. The substance of them is that the defendants, being "rivals in trade of the plaintiffs, obtained by legitimate means "orders from certain persons, accepting the responsibility of "litigation if litigation should ensue by reason of the plaintiffs "setting up that the order given to the defendants created some "right of action by the plaintiffs against the party who gave the "defendants their order. The first head of complaint which I "indicated at the commencement of this judgment having failed, "the plaintiffs cannot say that the defendants had not a bona "fide legitimate interest in the protection of their customers in "the matter, and, that being so, there was in my judgment no "maintenance."

In this state of the authorities, how does the present case stand? Sir Andrew presses us with the statement of Lord Esher in *Alabaster* v. *Harness* [53] to the effect that the interest required to repel a charge of maintenance is " some interest recognized by "the law in some matter at issue in the suit," the concurring observations of Lopes and Rigby L.JJ.[54] in the same case, the statement of Lord Parker in *Oram* v. *Hutt* [55] to the effect that for this purpose " A common interest means an interest recog-"nized by law in the subject-matter of the action or some issue "between the parties to the action," and Lord Sumner's epigrammatic observation in the same case that " a common "cause is not a common interest." [56] He says that these were decisions of the Court of Appeal and, moreover, decisions expressly or impliedly approved by a majority of the House of Lords in *Neville* v. *London " Express " Newspaper Ld.*[57] and that we are bound to follow them. He says further that, following these decisions, as we are bound to do, we can come to no other conclusion than that the charge of illegal maintenance against A.C.A. and the trustee company is made out, because no members of A.C.A. other than the plaintiffs in the action and the persons represented by the trustee plaintiffs had any interest recognized by the law in the subject-matter of or any issue in the action, the subject-matter of the action being the alleged pollution of Mrs. Martell's part of the River Derwent, to the detriment of her rights as riparian owner and the rights of the remaining plaintiffs as tenants of the fishing in the same waters, and the issues in the action being whether the defendant company was in fact polluting the relevant part of the river and, if so, whether the plaintiffs were entitled to an injunction to restrain the continuance of such pollution and to damages in respect of the pollution already suffered. In this subject-matter and these issues (says Sir Andrew) the remaining members of A.C.A. as such have in law no interest whatever, and it is not suggested that any of them has any such interest otherwise than as a member of A.C.A.

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[53] [1895] 1 Q.B. 339, 343.

[54] Ibid. 344, 346.

[55] [1914] 1 Ch. 98, 104.

[56] Ibid. 106.

[57] [1919] A.C. 368.

I appreciate the force of Sir Andrew's argument and, speaking for myself, I find it impossible to hold that we would be justified in regarding ourselves as no longer bound by *Alabaster* v. *Harness* [58] and *Oram* v. *Hutt* [59] on the strength of the changes in public policy or in social or economic conditions which are said to have taken place since those cases were approved in the year 1918 by a majority of the House of Lords in *Neville* v. *London "Express" Newspaper Ld.*[60] They were in fact followed as recently as June, 1954, by Lynskey J. in *Baker* v. *Jones.*[61] But it is an abuse of authorities to extract from judgments general statements of the law made in relation to the facts and circumstances of particular cases and treat them as concluding cases in which the facts and circumstances are entirely different and which raise questions to which their authors were not directing their minds at all. In *Alabaster* v. *Harness* [62] and *Oram* v. *Hutt* [63] the actions which had been maintained were actions for libel or slander, that is to say, actions in respect of wrongs essentially personal to the plaintiffs, and it is in this context that the observations in the judgments in these cases as to the common interest required in order to justify maintenance being an interest recognized by the law in the subject-matter of the action or some issue between the parties to the action must be considered. In *Neville* v. *London "Express" Newspaper Ld.*[64] the maintained action was of a different kind, but one in which the absence of any common interest between the maintainers and the parties maintained was, if anything, plainer than it was in *Alabaster* v. *Harness* [65] and *Oram* v. *Hutt.*[66]

I ask myself whether, if the cases had been in this order of date, that is to say, first, *Alabaster* v. *Harness*,[67] second, *Oram*

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[58] [1895] 1 Q.B. 339.
[59] [1914] 1 Ch. 98.
[60] [1919] A.C. 368.
[61] [1954] 1 W.L.R. 1005; [1954] 2 All E.R. 553.
[62] [1895] 1 Q.B. 339.
[63] [1914] 1 Ch. 98.
[64] [1919] A.C. 368.
[65] [1895] 1 Q.B. 339.
[66] [1914] 1 Ch. 98.
[67] [1895] 1 Q.B. 339.

v. *Hutt*,[68] third, *British Cash and Parcel Conveyors Ld.* v. *Lamson Store Service Co. Ld.*[69] and, fourthly, *Plating Co.* v. *Farquharson*,[70] and had all been heard by a similarly constituted Court of Appeal, the court would have said in the *British Cash and Parcel Conveyors* case [71] or in *Plating Co.* v. *Farquharson* [72]: "We are bound by our own decisions in *Alabaster* v. *Harness* [73] "and in *Oram* v. *Hutt* [74] to hold that what was here done was "illegal maintenance." I would answer this question with a decided negative. In the *British Cash* case [75] I think that the court would have said: "That which is here alleged to have been "illegal maintenance was merely an incident in a legitimate "business transaction. It is an entirely different case from "*Oram* v. *Hutt* [76] and of a kind to which the observations of the "court in that case were in no way directed." Similarly, in *Plating Co.* v. *Farquharson* [77] I think that the court would have said: "The defendant here being engaged in a particular trade "was attempting to secure support for his appeal in a matter of "common concern to the trade from other persons engaged in it, "or in other words was inviting persons engaged in that trade "to join him in protecting their common trade interests by "supporting his appeal. With cases of this kind our decision in "*Oram* v. *Hutt* [78] has nothing to do."

Be that as it may, we are bound by the *British Cash* case [79] and *Plating Co.* v. *Farquharson* [80] just as much as we are bound by *Alabaster* v. *Harness* [81] and *Oram* v. *Hutt*.[82] It seems to me that the *British Cash* case [83] at all events shows that it is not illegal maintenance for a person to support the defence of an action in respect of a claim against which he has, as part of a legitimate business transaction, agreed to indemnify the defendant, and I cannot reconcile this with a strict application of the principle that maintenance can only be justified on the ground of common interest where the maintainer has some interest recognized by the law in the subject-matter of, or some issue in, the action. In such a case, the maintainer no doubt has a financial interest in the result of the action, but only because he has chosen to give the indemnity. The mere fact that he has given the indemnity surely cannot suffice to give him a common interest within the meaning of the principle. Otherwise, every maintainer who effected the maintenance of an action by giving an indemnity against damages and costs to the defendant, or against costs to the plaintiff, could plead by way of justification the common interest thus acquired, which is clearly not so. In my view, therefore, the true justification in cases such as the *British Cash* case[83] must be that the maintainer, having given the indemnity in the course of a legitimate and genuine business transaction, has a legitimate and genuine business interest in the result of the action which suffices to justify him in maintaining the defendant (as in the *British Cash* case[83] itself) or, as it might equally well be, the plaintiff. This leads me to conclude that a person who has a legitimate and genuine business interest in the result of an action must be taken for the purposes of the rule against maintenance to have an interest recognized by the law in the subject-matter of the action.

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[68] [1914] 1 Ch. 98.
[69] [1908] 1 K.B. 1006.
[70] 17 Ch.D. 49.
[71] [1908] 1 K.B. 1006.
[72] 17 Ch.D. 49.
[73] [1895] 1 Q.B. 339.
[74] [1914] 1 Ch. 98.
[75] [1908] 1 K.B. 1006.
[76] [1914] 1 Ch. 98.
[77] 17 Ch.D. 49.
[78] [1914] 1 Ch. 98.
[79] [1908] 1 K.B. 1006.
[80] 17 Ch.D. 49.
[81] [1895] 1 Q.B. 339.
[82] [1914] 1 Ch. 98.
[83] [1908] 1 K.B. 1006.

It seems to me further to follow from *Plating Co.* v. *Farquharson*,[84] to which I should add Lord Sumner's segregation in *Oram* v. *Hutt*[85] of insurance and mutual protection societies as in a different category from the case then under consideration in the words "there is no question here of the business of insurance "or of mutual protection societies," that persons engaged in a particular trade, or, by parity of reasoning, persons engaged in a particular profession or individually possessed of proprietary interests of a particular kind, may lawfully form themselves into an association with a view to protecting at the expense of all, and if necessary by litigation at the common expense, the interests of each in the common field.

Whether I am right or not in attributing this effect to *Plating Co.* v. *Farquharson*[86] and Lord Sumner's observation in *Oram* v. *Hutt*[87] to which I have just referred, I would for my part decline to hold an association of that description guilty of maintenance in supporting one of its members in the prosecution or defence of an action of the relevant kind in the absence of clear authority constraining me to do so, and no authority which I can regard as so constraining me has been cited. Accordingly, I would hold that an association of a number of persons individually interested as riparian owners or holders of fishing rights in the preservation from pollution of the waters of various rivers in different parts of the country could, without being guilty of the crime or tort of maintenance, support with any funds at their disposal actions brought by individual members to restrain the pollution of the rivers to which the interests of those members related. In this simple hypothetical case, each member of the association would have legal rights in relation to some particular river which he would be entitled to protect by bringing an action against any person wrongfully polluting it, and would have a legitimate and genuine business interest in contributing to the financial support of an action brought by any other member to protect that other member's legal rights, whether in relation to the same or some other river, in the shape of his expectation as a member of the association that in the event of his own legal rights being infringed he in his turn would receive from his fellow members similar support in the prosecution of any action he might find it necessary to bring for the purpose of protecting those rights.

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[83] [1908] 1 K.B. 1006.

[84] 17 Ch.D. 49.

[85] [1914] 1 Ch. 98, 106.

[86] 17 Ch.D. 49.

[87] [1914] 1 Ch. 98, 106.

Sir Andrew says that even if there would be no illegal maintenance in such a case, the present case is of a different character, because membership of A.C.A. is not limited to persons having legal interests in the waters of rivers, such as riparian proprietors or holders of fishing rights, and he points to various passages in the literature and appeals issued by the A.C.A. showing that they seek support from any and every member of the public, whether they have any such interests or not and, indeed, whether they are themselves anglers or not. It seems that, by way of support for this argument, two employees of the defendant company who had no interests in rivers or in angling applied (as I think somewhat disingenuously) for membership of the A.C.A. and were admitted to membership without inquiry as to their having any relevant interests.

I am prepared to assume that it is not the case that every member of A.C.A. has legal interests such as those of a riparian owner or holder of fishing rights so as to be entitled himself to bring an action in respect of the pollution of some particular river or rivers. But I am not satisfied that legal interests of that sort are the only interests of members on the strength of which the character of a mutual protection society can be claimed for A.C.A. by way of defence to the charge of illegal maintenance. I think that it is reasonable to include as a proper participant in an organization for mutual protection against the pollution of rivers any member who has in relation to some river such an interest as would justify him individually in lending financial support to the plaintiff in an action brought to restrain the pollution of that river. Interests in this category, which, together with the legal rights above referred to, I term "relevant interests," might be held to include, for example, the following: A man might be accustomed to fish in a particular river by the revocable permission of the riparian owner. Such a man might, I think, be held to have an interest recognized by the law, albeit a precarious one, in the subject-matter of an action brought by the riparian owner to restrain pollution of the river whereby the fishing was spoilt. Again, a man might be accustomed to fish in a particular river under licences personal to him periodically obtained for a consideration from the riparian owner. He, too, might, I think, well be held to have such an interest so long as any licence for the time being held by him was in force. The proprietor of an hotel near a good fishing river, depending for his custom on people coming to fish in the river, might be ruined if the fishing was spoilt by pollution. He, I should think, might well be held to have a legitimate and genuine business interest which would justify him in giving financial support to an action brought by the riparian owner to stop the pollution of the river. Indeed, it would, to my mind, be ridiculous if the law held him guilty of a crime for supporting an action to stop a state of affairs which was depriving him of his livelihood. Again, a vendor of fishing tackle might be held to be in a position comparable to that of the hotel proprietor. Other examples (not necessarily related to fishing) of damnum sine injuria arising from the pollution of a river, and making it a matter of real concern to the persons damnified that the pollution should be stopped, might no doubt be given. In general, I should say that all persons in that position ought, as a matter of justice and common sense, to be held entitled to contribute to their own protection by giving financial support to any action brought to stop the pollution by any person possessed of an interest in the river enabling him to bring such an action. Thus, in the view I take, the range of relevant interests is potentially of great width, and I am not disposed to limit it by reference to the strict and narrow definition of "common interest" laid down in *Alabaster* v. *Harness*[88] and *Oram* v. *Hutt*[89] with reference to the actions for libel and slander there in question. The pollution of a man's character or reputation by libel or slander is a matter personal to him, and he alone is concerned in the prosecution of any action brought in respect of it, even though the same words might be made the subject of an action by some other person. The pollution of a river is a physical fact which in itself may be productive of manifold mischief in varying degrees to many different people, and I do not think that the court should be astute to reject the mischief suffered or reasonably apprehended by any given individual as insufficient to justify him in contributing to the costs of an action to restrain pollution, or to hold him guilty of a crime in so contributing.

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[88] [1895] 1 Q.B. 339.

[89] [1914] 1 Ch. 98.

The evidence before us on this aspect of the case does no more than show that there may be some members of A.C.A. who have no relevant interests at all. If proof had been forthcoming that there was in fact a given number of members of A.C.A. who had no relevant interests at all, even in the wide sense which I am disposed to give to that expression, there might be a nice question as to what degree of dilution of the membership of an association such as A.C.A. by members having no relevant interests would suffice to convert financial assistance given by the association to individual members in litigation to protect their legal rights in the water of rivers from financial assistance justified on the principle of mutual protection into illegal maintenance. I use the word " degree " advisedly, for I think the question can only be one of degree. A further question of equal nicety might arise as to whether, if some degree of dilution is present, the effect of it is that the association's financial support of a given action by one of its members is illegal maintenance on the part of those members who have no relevant interests and justifiable maintenance on the part of those members who have relevant interests. If that is the effect of any dilution shown to exist, it could hardly be held that the association as a body was guilty of illegal maintenance; and, for my part, I would not be prepared to hold that those members who did have relevant interests were guilty of that crime. But if in such case illegal maintenance is to be imputed only to those members who had no relevant interests, then it would be necessary to pursue the investigation a step further and see what proportion, if any, of the funds applied in aiding the prosecution of the action was attributable to the contributions or donations of those members, for only that proportion of the funds could be said to have been illegally applied. Such inquiries would present insuperable difficulties in relation to a body of the size of A.C.A., the membership of which must be constantly changing, and the members of which may well include many who at some times have relevant interests and at others have none. I cannot think that guilt or innocence of the crime of maintenance should be made to depend on any such impracticable counting of heads, investigation of individual interests, and dissection of funds.

I think that the real question is whether A.C.A. can fairly be described as being in substance a body of persons individually possessed of legal interests as riparian owners or holders of fishing rights or having other relevant interests in the sense above indicated, so that when A.C.A., whether directly or through the medium of the trustee company, supports an action brought by one of its members in defence of his legal rights, it can fairly and as a matter of substance be held to be doing so in defence of the collective interests of its members on the principle of mutual protection. If that question can be answered affirmatively, then I think the charge of illegal maintenance should be held to be repelled, albeit that the membership of A.C.A. may include, and the funds at its disposal may be to some extent derived from, members who have no relevant interests, but who object on principle to the pollution of rivers. It should be noted that mere contribution of funds to A.C.A. is not illegal maintenance, and that the support of litigation is by no means the only purpose of A.C.A. The receipt of contributions or donations from non-members cannot, so far as I can see, affect the question one way or the other. If the purposes of A.C.A. are lawful purposes, I do not see how they can be made unlawful because non-members who approve of its purposes choose to contribute to its funds. I should perhaps add that I do not think it material that aid for any action brought by a member is given at the discretion of the committee of A.C.A. and not claimable by the member as of right.

On the evidence before us, it is quite impossible to say how A.C.A. might stand in relation to the test above formulated, which would be a matter of fact and degree to be determined by the jury in the theoretically possible but virtually unprecedented event of a criminal prosecution for illegal maintenance, but I can by no means presume against A.C.A., in what is, theoretically at all events, a criminal matter, that it would fail to satisfy that test.

For these reasons, I am of opinion that the defendant company, on whom the onus lies, has failed to show that A.C.A. and the trustee company as the instrument of A.C.A. have not a sufficient interest in the present action to justify them in giving financial support to the plaintiff in the prosecution of it without thereby committing the crime of illegal maintenance. This makes it unnecessary for me to consider whether, if A.C.A. and the trustee company were shown to have no such interest, they could nevertheless bring themselves within the specific exception applicable to the maintenance of suits out of charity, but, speaking for myself, I find great difficulty in bringing the case within that exception, and am disposed to accept Sir Andrew's argument, as above summarized, on this aspect of the matter.

Even if, contrary to my opinion, the defendant company should be taken to have succeeded in making out a case of illegal maintenance against A.C.A., and the trustee company as its instrument, I am by no means satisfied that it would be proper to order a stay of proceedings on that account. We have been referred to many cases in which actions have been held to have been illegally maintained, but to no case in which an order has been made for a stay of proceedings in a maintained action on the ground that it was being illegally maintained.

The question whether it might not be proper to order a stay on this ground was touched on, but left entirely open, by Atkin L.J. in *Wild* v. *Simpson*, where he said [90]: "To set the "procedure of the court in motion for a particular object may be "unlawful; but the proceedings themselves remain valid. They "vitally concern two parties at least not privy to the illegality—"namely, the opposing litigant and the court itself. I should "not expect therefore to find the proceedings, though unlawfully "maintained, to be declared void; though I reserve my opinion "as to whether the court, on being satisfied that pending "proceedings are being unlawfully maintained, has not power "to stay them as being vexatious and oppressive and an abuse "of the process of the court, and to continue such stay until "the court is satisfied that the proceedings are purged of the "taint of illegality."

It is well settled that the illegal maintenance of the plaintiff in an action is no defence to the action: see *Skelton* v. *Baxter*.[91] I find difficulty in reconciling this with the theory that it affords proper ground for a stay of proceedings. It is not, to my mind, a satisfactory answer to this difficulty to say that the stay would be of a temporary character only, operating until such time as the proceedings are purged of the taint of illegality. Once there has been illegal maintenance, the crime by which the proceedings are said to be tainted has been irretrievably committed, and I do not see how the taint could be purged otherwise than by discontinuing these proceedings and starting a fresh action. That would, in effect, make maintenance a defence to the action, which it clearly is not. If the court should not allow a plaintiff to proceed with the prosecution of his action while he is being illegally maintained, it would seem that, by parity of reasoning, the court should not allow a defendant to proceed with his defence while he is being illegally maintained. In the latter case, a stay of proceedings would obviously be inappropriate, and indeed would benefit the party alleged to be abusing the process of the court; and to strike out the defence would be as much as to make the illegal maintenance of the defendant a ground for holding the plaintiff entitled to judgment. Moreover, it seems to me undesirable that the question whether an action is being illegally maintained should be adjudicated upon on an application to stay proceedings in that action, for this procedure involves, in effect, a trial of the question whether the alleged maintainer is guilty of what is still, theoretically at all events, a crime, in the absence of the person accused.

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[90] [1919] 2 K.B. 544, 564; 35 T.L.R. 576.

[91] [1916] 1 K.B. 321, 326; 32 T.L.R. 130.

I think *Elborough* v. *Ayres*,[92] if anything, tends to support the view that a stay should not be granted. In that case an application was made in the Chancery Court for an injunction to restrain one Ayres and his solicitors from proceeding with the taxation of costs in an action at law, on the ground that the action was illegally maintained, and Sir William James V.-C. said [93]: "It is "admitted, in fact, that as the action was Mr. Ayres' action, he "would be entitled to the damages; and the fact that he was "assisted illegally, if he was assisted illegally, it is admitted, "would not be any plea or answer to the action at law. I apprehend that it clearly would have been no ground for interference "by this court to prevent the action from going on."

For the reasons I have endeavoured to state, I would dismiss this appeal.

HODSON L.J. stated the facts briefly and continued: The unlawful maintenance alleged is, first, that an unincorporated association called the Anglers' Co-operative Association, of which the Derwent Angling Association is a club member, instigated the latter to procure a riparian owner to join with it in bringing an action against the defendant company, she having no wish to do so; second, that a company called the Anglers' Co-operative Association Trustee Company Ld., prior to the proceedings, gave to the plaintiffs an indemnity against all costs they might incur or fail to recover from the defendant company. It is to be observed that neither the Anglers' Co-operative Association nor the Anglers' Co-operative Association Trustee Company Ld. are parties either to the action or to the application before the court and, further, that it is well settled that an unlawful maintenance agreement is no defence to the action: *Hilton* v. *Woods*.[94]

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[92] (1870) L.R. 10 Eq. 367.

[93] Ibid. 373.

The defendants are seeking to stay the action until the plaintiffs have purged themselves of the taint of illegality, so that at least temporarily they will be in as strong a position as if they had been able to set up the agreement as a defence to the action. There is no precedent for such an application having been successfully made, but the defendant company relies on the following passage from the judgment of Atkin L.J. in *Wild* v. *Simpson*[95]: "To set the procedure of the court in motion for a particular "object may be unlawful; but the proceedings themselves remain "valid. They vitally concern two parties at least not privy to the "illegality—namely, the opposing litigant and the court itself. I "should not expect therefore to find the proceedings, though un-"lawfully maintained, to be declared void; though I reserve my "opinion as to whether the court, on being satisfied that pending "proceedings are being unlawfully maintained, has not power to "stay them as being vexatious and oppressive and an abuse of the "process of the court, and to continue such stay until the court is "satisfied that the proceedings are purged of the taint of "illegality."

It was submitted that maintenance was a common law misdemeanor and a criminal offence by statute and was also a tort at common law, and for this reason the action ought to be stayed. Finally, however, it was conceded that the tortious aspect of maintenance was irrelevant on this application, since, in view of the decision of the majority of the House of Lords in *Neville* v. *London "Express" Newspaper Ld.*,[96] an action for maintenance at common law will not lie without proof of damage for the mere invasion of a right but only in respect of an offence which causes damage to the plaintiff. Hence, although by a majority differently constituted in the same case, the House held that the success of the maintained action is not of itself a bar to civil proceedings, it was admitted that until the maintained action had been disposed of, the tortious act could not be proved.

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[94] (1867) L.R. 4 Eq. 432.
[95] [1919] 2 K.B. 544, 564.
[96] [1919] A.C. 368, 383.

It remains, therefore, to consider the question from the criminal aspect. Generally speaking, if it is clear that an action is tainted with criminal illegality, the court will seek to protect itself from the abuse of its process. It becomes necessary to ascertain, if possible, of what the crime consists and what are the defences open to the persons accused thereof.

In this connexion, some reference to the history of the crime is needed. To use the graphic language of Lord Loughborough in *Wallis* v. *Duke of Portland*,[97] maintenance is founded on the principle that "parties shall not by their countenance aid the "prosecution of suits of any kind; which every person must bring "upon his own bottom and at his own expense." The law was no doubt in medieval times rigid in the prohibition of maintenance of all kinds, and when the country was in an unsettled and lawless state the barons did not scruple to use their resources for their general advantage. Hence a series of statutes beginning with 3 Edward 1, cc. 25 and 28 and culminating in the statute 32 Henry 8, c. 9, were passed; but it was not until the strong government of the Tudors came into being, reinforced by the Star Chamber, that maintenance was suppressed. (See Professor Holdsworth's History of English Law (Vol. VIII, at p. 298); and, for a list of the relevant statutes, see *Neville's* case, *per* Lord Shaw.[98]) In later days, maintenance survived in a somewhat different form, and maintainers no longer guaranteed to procure success in litigation, but provided the money to that end. In connexion with the provision of money, the rigour of the rule has been modified by exceptions, so that where the exceptions apply there is no unlawful maintenance.

These exceptions are conveniently set out in the judgment of Lord Coleridge C.J. in the well-known case of *Bradlaugh* v. *Newdegate*[99]: "As a general rule there is no doubt that such "common interest, believed on reasonable grounds to exist, will "make justifiable that which would otherwise be maintenance. "The oldest authorities, authorities which hold a multitude of "things to be maintenance which would not be held so now, all "lay down this qualification. Brooke, Fitzherbert, Rolle, "Hawkins, Viner, Comyns, to cite no more, all concur in this. "Buller J., in his celebrated judgment in *Master* v. *Miller*,[100] "strongly insists upon it. But then the instances they give "show the sort of interest which is intended. A master for

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[97] 3 Ves.Jun. 494, 501–2.

[98] [1919] A.C. 368, 426, 427.

[99] 11 Q.B.D. 1, 11.

[100] 4 T.R. 320.

"a servant, or a servant for a master; an heir; a brother; "a son-in-law; a brother-in-law; a fellow commoner defending "rights of common; a landlord defending his tenant in a suit "for tithes; a rich man giving money to a poor man out "of charity to maintain a right which he would otherwise "lose. But in all these cases the interest spoken of is an "actual valuable interest in the result of the suit itself, either "present, or contingent, or future, or the interest which con-"sanguinity or affinity to the suitor give to the man who aids him, "or the interest arising from the connexion of the parties, e.g., "as master and servant, or that which charity and compassion "give a man in behalf of a poor man who, but for the aid of his "rich helper, could not assert his rights, or would be oppressed "and overborne in his endeavour to maintain them." In *Alabaster* v. *Harness*,[101] this court was not disposed to extend the list of exceptions. (See *per* Lord Esher.[102])

The House of Lords in *Neville* v. *London "Express" Newspaper Ld.*[103] approved the decision in *Alabaster* v. *Harness* [104] as to the extent of the exceptions (see *per* Lord Finlay [105]). It is to be noted, however, that no question was raised in the House as to the extent of the exceptions, since these were not material to the decision of the case. Sir Andrew Clark has argued, nevertheless, that the list of exceptions is closed, and that if this case does not fall within the recognized exceptions, the action is being unlawfully maintained. This argument is a formidable one, and Mr. Russell, on behalf of the plaintiffs, recognized that the language used by the members of the Court of Appeal in *Alabaster* v. *Harness* [106] will not readily cover a common interest such as he seeks to establish between his clients and those whom it is alleged are unlawfully maintaining their action. Moreover, the same court, in *Oram* v. *Hutt*,[107] adopted the same standpoint as their predecessors in the earlier case, and these cases are binding on the court today. The observations of the court were, however, directed to maintenance of the particular cases which they had to consider, namely, libel actions, which may be said to have a peculiar quality in that the personal reputation of an individual is not readily susceptible to the conception of the common interest shared therein with other persons.

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[101] [1895] 1 Q.B. 339.
[102] Ibid. 343.
[103] [1919] A.C. 368.
[104] [1895] 1 Q.B. 339.
[105] [1919] A.C. 368, 385.
[106] [1895] 1 Q.B. 339.
[107] [1914] 1 Ch. 98.

There are, however, other decisions of the Court of Appeal, one earlier than *Alabaster* v. *Harness*,[108] namely, *Plating Co.* v. *Farquharson*,[109] and one later, namely, *British Cash and Parcel Conveyors Ld.* v. *Lamson Store Service Co. Ld.*,[110] in which the common interest held to be sufficient to rebut an allegation of unlawful maintenance was in each case a common commercial interest such as scarcely to come within the strict limits of the language used in *Alabaster v. Harness*.[111] I am myself of the opinion, for the reasons given by Jenkins L.J., that in dealing with the case of pollution of a river, a wider conception of common interest may be permitted than in the case, for example, of a libel action, so that the Anglers' Co-operative Association, in maintaining the plaintiffs' claim, may fairly be said to be doing so on the principle of mutual protection, which has been recognized to exist in a number of cases covering the activities, for example, of trade unions.

In *Allen* v. *Francis*,[112] Lord Cozens-Hardy M.R. said[113]: "A workman desiring to make a claim against his employer "may be helped by his trade union, or by his club, or approved "society." The same judge referred to the passage I have just cited, in *Bobbey* v. *W. M. Crosbie & Co. Ld.*[114] Swinfen Eady L.J. repeated and agreed with the actual words of the Master of the Rolls. This statement of the law has been acted on and accepted as correct before and since the decision in *Allen* v. *Francis*[115] was given, as is well known to those who practise in these courts; yet the common interest which binds the members of a trade union together for the purpose of supporting an action against an employer by one of its members does not seem readily to be covered by the formula which Sir Andrew Clark seeks to apply to all cases, namely, that the maintainer must have an interest recognized by law in the subject-matter of the action. It is difficult to see what common interest one workman has in an action by another workman against his employer for personal injuries, except the interest arising from a desire to protect one another in case other accidents occur involving injury to other workmen due to the negligence of employers.

Sir Andrew met this argument, as I understood him in the last resort, by saying that he did not admit the activities of trade unions in maintaining actions of the kind indicated were lawful and that there was no direct decision in point. This may be so; but there is some relevance in considering the dicta of Lord Cozens-Hardy M.R.,[116] and the earlier dictum of Lord Alverstone C.J. (in *Greig* v. *National Amalgamated Union of Shop Assistants*)[117] to which Jenkins L.J. referred; and there is no record in a long history of litigation of any employer having ever taken the point that all such trade union activity was unlawful. That the common interest which is spoken of is more elastic than the rigid formula would suggest is, I think, supported by the way the motive of charity is treated by Lord Coleridge in *Bradlaugh* v. *Newdegaie*,[118] when he referred, as an example of common interest, to the interest which charity and compassion give a man on behalf of a poor man. I should add that I do not think that this case can be regarded as covered by the exception in favour of charity, since I do not regard the protection of anglers in their recreations as a charitable object, even if the plaintiffs in the present action could properly be regarded as poor. Indeed, the main argument of the plaintiffs was directed to show that they had a common interest with the plaintiffs, based on the need of mutual protection rather than that the Anglers' Co-operative Association was moved by a charitable motive to aid poor people.

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[108] [1895] 1 Q.B. 339.

[109] (1881) 17 Ch.D. 49.

[110] [1908] 1 K.B. 1006.

[111] [1895] 1 Q.B. 339.

[112] [1914] 3 K.B. 1065; 30 T.L.R. 695.

[113] [1914] 3 K.B. 1065, 1067.

[114] (1915) 84 L.J.K.B. 856, 858.

[115] [1914] 3 K.B. 1065.

For the purpose of considering the application for a stay, I will assume, without admitting, that the category of the exceptions is, as contended, closed, and that it is too late for the court, when considering the law of maintenance, to extend the list and that this case does not fall within it. I have made the reservation that I do not admit that the category is closed, having in mind the judgment of Sir Herbert Cozens-Hardy M.R. in *British Cash and Parcel Conveyors Ld.* v. *Lamson Store Service Co. Ld.*[119] Having listened to a learned argument on the common law action for maintenance, he said[120]: "Beyond all "doubt there was a time when what the defendants did would "have been regarded as criminal. But there is little use in "citing ancient text-books on this branch of the law. The law "has been modified in accordance with modern ideas of propriety." I content myself with adopting in 1954 what Sir Herbert Cozens-Hardy said in 1908. It is by no means clear to me that the plaintiffs in this action could be prosecuted successfully for aiding and abetting the common law or statutory misdemeanor of maintenance, even on the footing that they do not come within the recognized exceptions to the rigid rule. There has been no modern instance of a prosecution cited to us. Archbold's Criminal Pleading, Evidence and Practice gives a precedent for an indictment, but cites none but civil authorities in the text.

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[116] [1914] 3 K.B. 1065, 1067.
[117] 22 T.L.R. 274.
[118] 11 Q.B.D. 1, 11.
[119] [1908] 1 K.B. 1006.
[120] Ibid. 1012.

The limits of the tort have been defined by the House of Lords in *Neville's* case,[121] where it was held that no action for tort would lie without proof of special damage. Although the House held that the success or failure of the maintained action was not the final criterion of the existence of special damage, it might be still open to a defendant to the criminal charge to argue that the limits of the crime are the same as those of the civil wrong. Lord Finlay, having said[122] "The action for maintenance is, in my opinion, one which can be sustained only if "special damage has been occasioned to the plaintiff by the "maintenance," continued as follows[122]: "The maintenance "may be punishable as an offence." Later, he said[122]: "The "criminal law prohibits and may punish the act, but in the "absence of damage the remedy is not by civil action." Lords Haldane and Atkinson agreed with Lord Finlay, but Lord Shaw, with whom Lord Phillimore agreed, took the view that the test of maintenance is the test of the quality of the act itself as it bears on the attainment of justice in the particular case, and that the test either of tort or of offence is primarily whether it contains that quality which is essential both by the statute and the common law of England. In view of this conflict of opinion, I am not satisfied that it would not be open to a man prosecuted before the conclusion of the maintained action to plead that he had committed no crime unless and until it were proved that an injustice had been worked.

It is not necessary to express an opinion as to whether this plea would succeed, but there being (unlike cases of libel, for example) no decision showing any distinction between the elements of the crime and of the tort, the court, I think, would be unwilling to grant a stay when the ground for so doing depended on the drawing of a distinction between the tort and the crime for which there is no specific authority apart from the guarded dicta of Lord Finlay, inferentially supported by Lords Haldane and Atkinson in *Neville's* case. Further, the granting of a stay to the defendant when the ground for staying affords no defence to the action, would, on the face of it, be unjust. Finally, it would work an injustice between plaintiffs and defendants, seeing that defences as well as claims can be maintained. A defence cannot be stayed without depriving a plaintiff, at least temporarily, of his rights, so that a plaintiff, if the roles were reversed, would presumably be in a position to strike out a maintained defence, which would be tantamount to making a plea of maintenance in reply destructive of a valid defence. Even if it were established that the proceedings were so tainted with illegality that the court ought not to pronounce judgment in favour of the plaintiff, it would seem that a stay is an inappropriate course. If a crime has been committed, it is difficult to see how the plaintiffs could effectively purge themselves of the illegality, except by starting a fresh action free from the taint of the crime. In any event, the point can scarcely be taken by a defendant since, as I have stated earlier, it is not open to him to set up as a defence that the action that he seeks to resist is being maintained by a third party.

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[121] [1919] A.C. 368.

[122] Ibid. 379, 380.

This, I think, accords with the view expressed by Sir William Milbourne James in *Elborough* v. *Ayres*[123]: " It is admitted, in " fact, that as the action was Mr. Ayres' action, he would be " entitled to the damages; and the fact that he was assisted " illegally, if he was assisted illegally, it is admitted, would not " be any plea or answer to the action at law. I apprehend that it " clearly would have been no ground for interference by this court " to prevent the action from going on."

For these reasons, I am of opinion that the application for a stay should be dismissed.

VAISEY J. In the 10th edition of Russell on Crime there is a note (on p. 374) explaining the origin of " maintenance " in the following words: " The abuse of legal proceedings by " oppressive combinations to carry them into effect is said to " have speedily appeared upon the establishment of the laws in " the time of Edward I. ' Instead of their former associations for " ' robbery and violence, men entered into formal combinations to " ' support each other in law suits; and it was found requisite to " ' check this iniquity by Act of Parliament.' " If such were the origin of the principle, I wish that we could have held that to maintain a party in litigation is only wrongful where there is something in the nature of a conspiracy between the maintained party and the maintainer to defeat, rather than to further, the ends of justice. But in face of the authorities, many of them recent, which have been cited to us, it would seem that maintenance is still in law both a tort and a crime in all cases, except where it can be brought into one of the recognized exceptions to the rule which prohibits it. It may well be that those exceptions are not entirely rigid, but are in some degree flexible, as suggested by Sir Herbert Cozens-Hardy in the passage already cited from his judgment in *British Cash and Parcel Conveyors Ld.* v. *Lamson Store Service Co. Ld.*[124] And as "poverty" is itself a relative conception and term, I should myself have been prepared to say that the plaintiffs in this case are in the position of the man to whom Lord Coleridge C.J. refers in his judgment in *Bradlaugh* v. *Newdegate*,[125] as "a poor man who, but for the "aid of his rich helper, could not assert his rights, or would be "oppressed and overborne in his endeavour to maintain them"; for the expense involved in bringing or defending such an action as this, involving as it does much expert scientific and other evidence, is far beyond the means of any litigant who is neither a very rich man nor a wealthy corporation. I prefer, however, to base my judgment in favour of dismissing this appeal mainly on the simple ground that the alleged tortfeasor or criminal (that is to say, either the Anglers' Co-operative Association, an unincorporated body, or the Anglers' Co-operative Association Trust Ld.) is not before the court, and has not been found or proved to be guilty of the alleged tort or crime in these or any other proceedings. To condemn it in its absence, and unheard, and giving it no opportunity of establishing its innocence, would, in my view, be plainly contrary to the most elementary and fundamental requirements of justice. Any man, and any body of men, when accused or suspected of a crime, will be presumed to be innocent of it until his or their guilt is proved, and this applies equally to a corporation such as the Anglers' Co-operative Association Trust Ld. It makes no difference, in my judgment, if the allegation is only of an attempt or intention to do a wrongful act or commit a crime, and I think that it is just as necessary for the actual attempt or intention to be proved as it would be in the case of the act or crime itself. The defendants' application to stay the action seems to me to be misconceived;

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[123] L.R. 10 Eq. 367, 373.

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[124] [1908] 1 K.B. 1006, 1011–12.

[125] 11 Q.B.D. 1, 11.

and, for the reasons which I have tried to express, as well as for those given by my Lords (in which I would respectfully concur), I am for dismissing this appeal.

Appeal dismissed with costs. Leave to appeal to House of Lords refused.

Solicitors: *Allen & Overy; Gerrish & Co.*

M. M. H.

COOPER v. CRITCHLEY.

C. A.

1955
Jan. 26, 27, 28.

Evershed M.R., Jenkins and Hodson L.JJ.

[1954 G. No. 1294.]

Vendor and Purchaser—Contract—Memorandum in writing—Contract to sell undivided share in land—Contract between legal joint tenants—Whether memorandum in writing required—"Interest in "land"—Meaning—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *ss.* 40 (1), 205 (1) (*ix*) (*x*).
Tenants in common.

Premises in Watford were vested in the plaintiff and defendant as joint tenants in fee simple on trust for sale and to hold the net proceeds on trust for themselves in equal shares. They had leased the premises to a limited company of which they were the sole directors and sole shareholders and the company carried on business at the premises. Negotiations were started by letter dated December 17, 1953, from the plaintiff to the defendant, for the sale by the plaintiff to the defendant both of the plaintiff's half share in the freehold premises and of his interest in the company. The negotiations for the sale and purchase continued partly by letters between the parties and partly by conversations on the telephone and the terms alleged to have been agreed were formulated in a draft contract drawn up by the defendant's solicitors which was never signed by him. Subsequently, he refused to proceed with the purchase. The plaintiff claimed specific performance of an agreement for sale which he alleged was contained in the correspondence. The defendant denied that any concluded agreement had ever been made and, further, he relied on section 40 of the Law of Property Act, 1925. Vaisey J. dismissed the action, holding that the negotiations between the parties had never resulted in a binding contract; and the Court of Appeal affirmed his decision.

Per curiam. A share in the proceeds to arise from a sale of land would seem to be an "interest in land" within section 40 of the Law of Property Act, 1925. However, if that proposition is too general, in a case such as this, where the contract relates to a sale by one to the other of two legal joint tenants of land, each of whom is beneficially entitled to one-half of the proceeds to arise from its sale and who, moreover, are joint lessors under a lease to which the property is subject, and by virtue of the transaction the purchaser will acquire, subject to and with the benefit of the lease, the whole estate, legal and beneficial, in the entirety of the land, the contract cannot be regarded as anything other than a contract for the sale of an "interest in land." Accordingly, a memorandum in writing signed by the party to be charged was required by section 40 (1) of the Law of Property Act, 1925.

In re Price [1928] Ch. 579; *Edwards* v. *Hall* [1949] W.N. 38; [1949] 1 All E.R. 352 considered.

Decision of Vaisey J. affirmed.

APPEAL from Vaisey J.

The plaintiff, Leslie Charles Cooper, in this action sought specific performance of an alleged contract entered into between himself and the defendant Baden Arthur Critchley.

The parties were the estate owners in respect of the fee simple of No. 35, Market Street, Watford, which was vested in them as joint tenants upon trust for sale and to hold the net proceeds of sale upon trust for themselves as tenants in common in equal shares. They were also at all material times the sole directors of a company called Sterlina Furnishers Ld., each holding one-half of the issued capital of the company. The parties had leased No. 35, Market Street, to the company and the company's business was being carried on at that address.

Differences having arisen between the parties, the plaintiff wrote on December 17, 1953, to the defendant offering to sell to him on certain terms (1) the plaintiff's half-share in the Market Street premises, and (2) his half-interest in the company. Those terms were not accepted by the defendant, who by letter of December 23, made a counter-offer which was to remain open until December 31. Some discussions followed between the parties about two matters on which they were not in agreement. On December 30, 1953, the plaintiff wrote to the defendant accepting the latter's offer of December 23, subject to two matters to which he referred in his letter and to which he alleged the defendant had orally agreed. On January 7, 1954, the defendant wrote agreeing to the plaintiff's terms contained in his letter of December 30, subject to a formal contract being prepared by his solicitors. A draft contract was prepared by the defendant's solicitors and correspondence followed between the parties' solicitors. The defendant subsequently refused to sign any contract and broke off the negotiations.

C. A.
1955

COOPER
v.
CRITCHLEY.

The plaintiff brought this action for specific performance, alleging that a binding contract had resulted when he wrote his letter of December 30, 1953, which amounted to an acceptance of the defendant's offer in his letter of December 23 as modified by certain conversations. The defendant denied that any binding contract had ever been entered into and further he relied on section 40 of the Law of Property Act, 1925.[1]

Vaisey J. dismissed the action, holding that, on the evidence, the parties had never in fact reached agreement.

The plaintiff appealed.

The case is reported only on the question whether, if there were a binding contract, it was necessary, as the defendant alleged, for there to be a memorandum of its terms signed by him to satisfy the provisions of section 40 of the Law of Property Act, 1925. The plaintiff contended that since the contract was one for the sale of a share in the proceeds of sale of land the section had no application.

H. E. Francis for the plaintiff. On the evidence here the parties had entered into a concluded contract. If that is so, the fact that there is no memorandum in writing of that contract to satisfy the requirements of section 40 of the Law of Property Act, 1925, does not matter, since the plaintiff is selling not an "interest in land" within the section but a share of the proceeds of sale of land. Such an interest is personalty: *In re Price.*[2] The interest of a beneficiary under a trust for sale is an interest in money, not an interest in land: *Edwards* v. *Hall.*[3] Section 40 has no application to such an agreement.

W. Dudley Collard for the defendant. If a binding contract was ever entered into between the parties, which is denied, it is unenforceable because there is no memorandum of its terms to satisfy section 40. The definition of land in section 205 (1) (ix) of the Act of 1925 is so wide as to cover every interest in land, including a share in the proceeds of sale. The decision in *In re Price*[4] does not assist; that decision was concerned with succession. *In re Fox*,[5] *In re Witham*[6] and *In re Jauncey*[7] are of some assistance. They are decisions on the Real Property Limitation Acts, which are in similar terms to the Law of Property Act, 1925. It was there held that the proceeds of sale of land was an interest in land. In *Miller* v. *Collins*[8] it was held that an interest in a sum of money was an interest in land within the Fines and Recoveries Act. Those decisions were before the Law of Property Act, 1925, and Parliament must be assumed to have intended that the same meaning should be placed on the language of the later Act as had been placed on the similar language of the earlier Acts.

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[1] Law of Property Act, 1925, s. 40 (1): "No action may be brought "upon any contract for the sale or "other disposition of land or any in- "terest in land, unless the agreement "upon which such action is brought, "or some memorandum or note there- "of, is in writing, and signed by the "party to be charged or by some other "person thereunto by him lawfully "authorized."

S. 205 (1): "In this Act . . . "the following expressions have the "meanings hereby assigned to them "respectively, that is to say:— . . . "(ix) 'Land' includes land of any "tenure . . . and an easement, right, "privilege, or benefit in, over, or "derived from land; but not an un- "divided share in land; . . ."

[2] [1928] Ch. 579.

[3] [1949] W.N. 38; [1949] 1 All E.R. 352.

H. E. Francis in reply. Section 40 does not apply to this case. This is not a contract for the sale of land but under the conveyance to the parties each is entitled to one-half of the balance of the proceeds of sale and of the net rents and profits until sale after all outgoings have been paid. That is not an interest in land. While a liberal construction should be placed on the Limitation Acts a narrow construction should be placed on section 40. The effect of the sale would be to leave the legal estate outstanding in the parties, unless the defendant had called on the plaintiff to transfer the legal estate.

EVERSHED M.R. I will ask Jenkins L.J. to deliver the first judgment.

JENKINS L.J. In this case the plaintiff, Leslie Charles Cooper, and the defendant, Baden Arthur Critchley, are each entitled to one-half of the issued share capital of a company called Sterlina Furnishers Ld. That is a company with an authorized capital of £5,000, divided into shares of £1 each, and the parties each hold 250 of the issued shares, the total issued share capital being only £500.

The parties are also entitled, under what in the old days would have been a tenancy in common, to premises known as 35, Market Street, Watford. Those premises are under lease to the company, which carries on in them the business of selling and dealing in carpets, rugs, floor coverings and such things, partly for cash and partly on hire-purchase terms.

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[4] [1928] Ch. 579.
[5] [1913] 2 Ch. 75.
[6] [1922] 2 Ch. 413.
[7] [1926] Ch. 471.
[8] [1896] 1 Ch. 573; 12 T.L.R. 228.

In or about December, 1953, there were differences between the parties with regard to the conduct of the business; and, in the result, they decided that they had better sever their association. With that object in view, the plaintiff wrote to the defendant on December 17, 1953, a letter containing certain proposals for the sale of his interest in the property and his holding of shares in the company to the defendant on certain terms. Those terms were not wholly acceptable to the defendant who made a counter-offer and negotiations ensued. Ultimately, the defendant intimated by his solicitors to the plaintiff's solicitors that he had decided not to go on with his proposed purchase of the plaintiff's interest.

The plaintiff maintains that what I have referred to as "negotiations" in fact resulted in a binding contract. The defendant, on the other hand, as his breaking off of the negotiations implies, takes the view that there was no binding contract; there were merely negotiations which were terminated before any binding contract was reached. In those circumstances, the plaintiff began the present action in the Chancery Division, claiming specific performance of the contract on which he relied.

The defences raised to his claim for specific performance were that the parties were not ad idem—I take it that that includes the contention that there was never any concluded contract; that any bargain which was struck was a bargain subject to contract and no formal contract was ever executed; and, lastly, that, in any case, there was no sufficient memorandum of the contract, if there had been a contract, under the provisions of section 40 of the Law of Property Act, 1925.

I will first consider whether there was any concluded contract between the parties. On that question Vaisey J. came to a conclusion adverse to the plaintiff, and it was thus unnecessary for him to consider the question of section 40 of the Act of 1925. His decision was, in effect, not only that there was no concluded bargain, but also that the parties had contemplated putting the terms into a final formal agreement before they were to be bound.

[His Lordship, after considering the evidence, continued:] I find myself unable to differ from the conclusion reached by the judge that there was here no binding contract. That makes it strictly unnecessary for me to consider the second question, namely, if there was a binding contract which would in other respects have been enforceable, whether the defendant has a good defence under section 40 of the Law of Property Act, 1925, on the ground that there is no sufficient note or memorandum in writing of this contract to satisfy the section; and, in my opinion, notwithstanding Mr. Francis's argument based on the letter of January 7, 1954, there clearly is not.

[His Lordship read section 40 (1) and continued:] It will be observed that the section refers to "any contract for the sale or "other disposition of land or any interest in land." The subject-matter of the sale in this case, so far as the premises 35, Market Street, Watford, are concerned, is the plaintiff's interest in the premises, if I may use that expression without prejudice. The nature of his interest is that the plaintiff and defendant are beneficial co-owners. Under the law as it stood before the Law of Property Act, 1925, they would have been simply tenants in common, each with an undivided share of the property. For conveyancing reasons, the law was, as everybody knows, altered by the Act of 1925, and the effect of the alteration was that interests of this kind could only be given effect to behind a trust for sale. Thus, the position as regards 35, Market Street, Watford, is that it is vested in the plaintiff and the defendant as joint tenants in fee simple upon trust to sell, with power to postpone, and to stand possessed of the profits to arise from any sale, and the net rents and profits until sale, in trust for themselves in equal shares.

That is the conveyancing position, and it is urged by Mr. Francis that it can no longer be said that what used to be known as an undivided share in land and now is a corresponding share in the proceeds of sale of the land, is "land or any interest in land" within the meaning of section 40; and he referred us to *In re Price*,[1] where it was held that the interest of the owner of a former undivided share in land in the proceeds of sale of the land to arise under the statutory trust for sale imposed by the provisions of the Law of Property Act, 1925, in regard to undivided shares was an interest in personalty. The passage for which we were referred to the case is in the judgment of Clauson J. He said[2]: "The "result of this survey of the new Acts seems to show that on "January 1, 1926, Thomas John Price ceased to have any estate "in the 14 acres or any part of it and became entitled to an "equitable interest in the proceeds of sale of the 14 acres— "namely, such interest as might be requisite for giving effect to "his rights as a person interested in the land. In my opinion, "such an interest is an interest in personal estate. By the "statutory imposition of a trust for sale the land has, so far as

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[1] [1928] Ch. 579.

[2] Ibid. 589.

"beneficiaries are concerned, been converted into money, and "Thomas John Price has an interest in the money."

Mr. Francis also referred us to *Edwards* v. *Hall*,[3] a case whose headnote shows it to be of a very different kind from the present one. The headnote is: "After September 3, 1939, one "of several tenants in common of a farm acquired the interest of "the others and became sole freeholder of the property. Subsequently, she gave the tenant of the farm notice to quit. "*Held*, the conveyance by the tenants in common of their interest "in the land to the other tenant in common was a sale of an "interest in land which was personalty, and not a sale of an "agricultural holding within the meaning of the Defence (General) "Regulations, 1939, reg. 62 (4A)"; and that had certain consequences as to the requirements of a valid notice to quit. I do not think that case is of any great assistance here.

I agree that, for certain purposes of disposition and devolution, the proceeds of sale to arise under a trust for sale of land are by virtue of the equitable doctrine of conversion to be considered as personalty, but the question in this case is whether, for the purposes of section 40 of the Law of Property Act, 1925, ~~an interest~~ in the proceeds which arise under a trust for sale of land is an interest in land within the meaning of that section. Mr. Dudley Collard referred us to certain authorities, which seem to me to be more nearly in point, in which similar interests were held to be interests in land for the purposes of other enactments. The first of those cases was *In re Fox*,[4] and it was there held by Warrington J., following *In re Hazeldine's Trusts*[5] and *Kirkland* v. *Peatfield*,[6] that "a mortgagor's interest in the proceeds of sale of land "held on a trust for sale is an interest in 'land' as defined by "the Real Property Limitation Act, 1833, s. 1, and, therefore, "under section 34 of the same Act and section 8 of the Real "Property Limitation Act, 1874, after the lapse of 12 years, in "the absence of any payment or acknowledgment, the title of the "mortgagee is extinguished."

The question was put by Warrington J.[7]: "Is this mort-"gage"—it will be remembered that it was a mortgage of a beneficiary's interest in the proceeds of sale of land held in trust for sale—"a mortgage of land or 'any share, estate, or interest' "in land within the meaning of the Real Property Limitation

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[3] [1949] W.N. 38; [1949] 1 All E.R. 352.

[4] [1913] 2 Ch. 75.

[5] [1908] 1 Ch. 34.

[6] [1903] 1 K.B. 756; 19 T.L.R. 362.

[7] [1913] 2 Ch. 75, 78.

"Act, 1833." His Lordship went on: "The question mainly "depends on the true construction of the interpretation clause "contained in section 1 of the Act of 1833, which says that the "word 'land' shall extend to, amongst other things, 'any share, "'estate or interest' in land, 'whether the same shall be a free-"'hold or chattel interest.' Is the interest which a person takes "in the proceeds of sale of land an interest in land? In my "opinion it is." Then he quoted the two authorities which I have mentioned.

The next case was *In re Witham*,[8] which raised a similar question. The headnote reads: "A testator gave the whole of "his residuary estate in trust for his wife for life, with remainder "to his children in equal shares, and he died in 1894, leaving a "widow and seven children. In 1903 one of the testator's sons "mortgaged his one-seventh share in his father's estate, which at "that date consisted of personalty and realty. The testator's "widow died in 1918, and after her death most of the realty was "realized. No interest was ever paid, and no acknowledgment "of the mortgage debt was given since 1903. *Held*, that the "mortgage debt, as against the proceeds of sale of the real estate, "was barred by section 8 of the Real Property Limitation Act, "1874." That was a decision of Sargant J., who followed the decision of the Court of Appeal in *In re Hazeldine's Trusts*,[9] which, as he said, Warrington J. had followed in *In re Fox*.[10] In *Miller* v. *Collins* [11] it was held that an interest of a married woman "in a sum of money, properly invested by her trustees upon a "mortgage of land, is an interest in land within section 77 of the "Fines and Recoveries Act." There was a somewhat similar decision under the Real Property Limitation Act in *In re Jauncey*.[12]

There is thus authority—not, it is true, relating to this particular Act—for the proposition that in Acts of Parliament the expression "interest in land" may include an interest in the proceeds of sale of land; and I would be disposed, with little hesitation, to give the words a similar meaning in section 40 of the Law of Property Act, 1925, were it not for the definition of land contained in section 205 (1) (ix) of the Law of Property Act, 1925, which states: "'Land' includes land of any tenure"—there follows a long enumeration of particulars ending with "an ease-"ment, right, privilege, or benefit in, over, or derived from

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[8] [1922] 2 Ch. 413.
[9] [1908] 1 Ch. 34.
[10] [1913] 2 Ch. 75.
[11] [1896] 1 Ch. 573.
[12] [1926] Ch. 471.

"land; but not an undivided share in land." One may also refer to paragraph (x), which provides: "'Legal estates' mean the "estates, interests and charges, in or over land (subsisting "or created at law) which are by this Act authorized to subsist or "to be created as legal estates; 'equitable interests' mean all "the other interests and charges in or over land or in the proceeds "of sale thereof; an equitable interest 'capable of subsisting as "'a legal estate' means such as could validly subsist or be "created as a legal estate under this Act."

The definition of land in section 205 (1) (ix) of this Act does, in so many words, exclude an undivided share in land; but that does not, to my mind, conclude the matter. The interest here in question is not an undivided share in land: it is a right to a share of the proceeds to arise from a sale of land, and paragraph (ix) does not say that such a right is not an interest in land, while paragraph (x) classes together as "equitable interests" interests in land or the proceeds of sale thereof. Moreover, the definitions in section 205 of the Act of 1925 are assigned subject to the qualification "unless the context otherwise requires." Section 40 of the Act of 1925, as is well known, replaced section 4 of the Statute of Frauds, and there is to my mind little doubt that, before the Law of Property Act, 1925, an interest in the proceeds to arise from a sale of land would, notwithstanding the equitable doctrine of conversion, have ranked as an interest in land for the purposes of section 4 of the old statute. I am reluctant to construe section 40 of the Act of 1925 as altering the law in this respect.

Accordingly, I would be disposed to hold that a share in the proceeds to arise from a sale of land is an interest in land within the meaning of section 40. But if I am wrong in my inclination to accept the proposition in these general terms, I think that in a case such as this, where the transaction to which the contract relates is a sale by one to the other of two legal joint tenants of land, each of whom is beneficially entitled to one-half of the proceeds to arise from its sale, and who, moreover, are joint lessors under a lease to which the property is subject, and by virtue of the transaction the purchaser will acquire, subject to and with the benefit of the lease, the whole estate, legal and beneficial, in the entirety of the land, the contract cannot well be regarded as anything else than a contract for the sale of an interest in land and, were it necessary for us to do so, I would so hold.

For the reasons which I have stated on the question of contract or no contract, I am of opinion that the judge's decision in this case should not be disturbed, and I would dismiss this appeal.

EVERSHED M.R. I am of the same opinion. [After expressing his agreement with Vaisey J.'s decision that the plaintiff had failed to establish the existence of a concluded contract, his Lordship continued:] I also agree with my brother that, in any event, the plaintiff would have failed upon the point arising under section 40 of the Law of Property Act, 1925, and add nothing to that, except that, in my judgment, if there was a contract for the sale or other disposition of an interest in land, then there was no memorandum or note of that contract signed by the defendant.

For those reasons I think that this appeal fails.

HODSON L.J. I agree.

Appeal dismissed.

Solicitors: *Church, Adams, Tatham & Co. for Wallington, Fabian & White, Watford; Mills, Lockyer & Co.*

B. A. B.

1955
Feb. 16, 17;
Mar. 1.

Vaisey J.

PRINCE ERNEST OF HANOVER *v.* ATTORNEY-GENERAL.

[1954 H. 723.]

Nationality—Naturalization—Royal family—Statute for naturalization of Princess Sophia and " all persons lineally descending from her " —Whether limited to persons born in the lifetime of Queen Anne—Effect of preamble on interpretation of statute—Enacting words clear, but ridiculous—Statute of 1705 (4 *&* 5 *Anne, c.* 16)*—British Nationality Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 56), *Sch.* 4, *Part II.*
Statute—Construction—Preamble.

A great-great-grandson of Ernest Augustus, Duke of Cumberland (a descendant of the Princess Sophia), who succeeded to the throne of Hanover in 1837, commenced an action against the Attorney-General to determine whether he was a British subject, having regard to the provisions of the Statute of 1705 (4 & 5 Anne, c. 16).

The statute, after reciting in the preamble that the Crown, on the death of Queen Anne without issue, was limited to the Princess Sophia and her issue, continued " to the end [that] the said " Princess . . . and the issue of her body, and all persons lineally " descending from her, may be encouraged to become acquainted " with the laws and constitutions of this realm, it is just and " highly reasonable, that they, in Your Majesty's lifetime . . . " should be naturalized " and proceeded to enact that " the said " Princess . . . and the issue of her body, and all persons lineally "descending from her, born or hereafter to be born, be and shall "be . . . deemed . . . natural born subjects of this Kingdom," Roman Catholics excepted:—

Held that, as the enacting words, though plain and unqualified, produced, when standing alone, results so inconvenient that Parliament must have intended to put some limit to their operation, the generality of their language must be read as being limited by an implication from the words of the preamble to descendants of the Princess born before the death of Queen Anne; the intent being that her immediate successors should be encouraged to become acquainted with the laws and constitutions of the realm.

The plaintiff's claim, accordingly, failed.

Ryall v. *Rowles* (1750) 1 Atk. 164 applied.

Powell v. *Kempton Park Racecourse Co.* [1899] A.C. 143; 15 T.L.R. 266 considered.

WITNESS ACTION.

By 4 & 5 Anne, c. 16 of 1705, which was intituled "An Act "for the naturalization of the Most Excellent Princess Sophia, "Electress and Duchess Dowager of Hanover, and the issue of "her body," it was provided: "Whereas the Imperial Crown . . . "after the . . . death of Your Majesty, [Queen Anne] . . . "without issue of your body, is limited by Act of Parliament, to "the Most Excellent Princess Sophia . . . grand-daughter of "the late King James I, and the heirs of her body, being "Protestants . . . and to the end [that] the said Princess . . . and "the issue of her body, and all persons lineally descending from "her, may be encouraged to become acquainted with the laws "and constitutions of this realm, it is just and highly reasonable, "that they, in Your Majesty's lifetime . . . should be naturalized, "and be deemed, taken, and esteemed natural born subjects of "England: . . . be it enacted . . . that the said Princess . . . and "the issue of her body, and all persons lineally descending from "her, born or hereafter to be born, be and shall be . . . deemed, "taken, and esteemed natural born subjects of this kingdom, as if "the said Princess, and the issue of her body, and all persons "lineally descending from her, born or hereafter to be born, had "been born within this realm of England, any law, statute, "matter, or thing whatsoever to the contrary notwithstanding."

The statute further provided for the exclusion of "every "person and persons who shall be naturalized by virtue of this "Act of Parliament and shall become a Papist or profess the "Popish religion."

The statute of 1705 was repealed by the British Nationality Act, 1948, which came into operation on January 1, 1949. That

Act provided that every person who was a British subject immediately before that date should become a British citizen thereunder.

The plaintiff, Prince Ernest of Hanover (who was the great-great-grandson of Ernest Augustus, Duke of Cumberland, a son of George III, who, on the accession of Queen Victoria in 1837, succeeded to the throne of Hanover, as by the law of the Kingdom of Hanover succession was only in the male line) commenced this action against the Attorney-General for a declaration that, by virtue of the above statutes, he was a British subject.

Kenneth Diplock Q.C. and *R. O. Wilberforce Q.C.* for the plaintiff. The Act of 1705 (which was passed as a result of the Act of Settlement of 1700, which was enacted to ensure Protestant succession to the throne) gives the status of a British subject to the descendants of the Electress Sophia born at any time, and is not limited to those who were born in the lifetime of Queen Anne. The nationality of the plaintiff was British at the time when the Act of 1705 was in force, and has not been affected by the repeal of the statute by the Act of 1948.

As to the history of nationalization, see the Act of 25 Edw. 3, stat. 1, and 7 Jac. 1, c. 2. With regard to the meaning of "issue" in 1705, see *Holland* v. *Fisher*[1] and *Warman* v. *Seaman*.[2] Prima facie the word "issue" in 1705 meant "descendants," but it was capable of having a more restricted meaning if the context so required.

When the British Nationality and Status of Aliens Act, 1914, was passed, many statutes, including 25 Edw. 3, stat. 1, were repealed, but the Act of 1705 remained in force until repealed by the British Nationality Act, 1948. Until 1948 the Act of 1705 covered all lineal descendants of the Electress, of whom at the present time there are upwards of 400 persons.

The Act must be construed in the light of the position in 1705, when the country was greatly in favour of Protestant succession and in fear of the Old and Young Pretenders. (See the long preamble to the Act of 12 & 13 Will. 3, c. 2.) The death of the Duke of Gloucester (who was born in 1689) in 1700 caused the hopes of a Protestant succession to be imperilled. The Act of 1705 was not merely concerned with the 70-year-old Electress, but with anyone on whom the Crown might descend. It must be construed in its historic context. No plainer words could have been used to show that it was intended to apply to any person on whom the Crown of England could descend. It is not necessary to look beyond the enacting words "and all persons descended." The intention to cover all generations of lineal descendants of the Electress could not have been expressed more clearly. It was, however, intended to exclude Roman Catholics because they were excluded from succession to the Crown. The words of the statute are plain and unambiguous and cannot be affected by the preamble: *Powell* v. *Kempton Park Racecourse Co.*[3]

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[1] (1662) O.Bridg. 181, 214.

[2] (1675) Pollexfen 112.

The Act of 1705 having remained in force until 1948, and the plaintiff being included in the class of issue of the body of the Electress, he was on January 1, 1949, when the British Nationality Act came into operation, a British subject under that Act.

Sir Reginald Manningham-Buller Q.C., A.-G., and *Bryan Clauson* for the Attorney-General. The court is asked to find that the Act of 1705 made all the 400 odd descendants British subjects. That was not the intention or the effect of the statute. There is nothing to indicate that, at that time, Parliament meant to make remote descendants British subjects.

The Act of Settlement uses the expression "heirs of the "body," which is narrower than "issue of the body" or "issue." [Reference was made to Stroud's Judicial Dictionary, vol. 2, for a definition of "heirs of the body."] The intention of the Act was to provide for succession, but Parliament was not concerned with persons who were not likely to be successors. The preamble to the Act of 1705 affords useful guidance as to the intention of that statute: Craies on Statute Law, 5th ed., p. 188. It was not the intention of the preamble that the general words should have the effect for which the plaintiff contends. The effect of the statute may be stated as follows: "We want to nationalize "those persons who are now alive and who become alive during "Her Majesty's lifetime." The phrase "nationalization in the "lifetime of Her Majesty" means nationalization of a person alive in the lifetime of Her Majesty. It cannot have been the intention that all her descendants should be nationalized; that was not necessary for the purposes of the Act. The words "in "Her Majesty's lifetime" are the vital words—the Act does not nationalize anyone born after the death of Queen Anne.

Diplock Q.C. in reply. The repeal of the Act of 1705 cannot affect its construction as applying to the plaintiff. The preamble does not cut down the clear words of the enacting part of the statute. [Reference was made to Maxwell on Interpretation of Statutes, 10th ed., p. 46, and to *Mace* v. *Cadell.*[4] The plain language of the Act shows that the intention of Parliament was that all descendants, other than Roman Catholics, were, until the Act was repealed, to be British subjects.

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[3] [1899] A.C. 143; 15 T.L.R. 266.

Cur. adv. vult.

March 1. VAISEY J. The plaintiff in this action is H.R.H. Prince Ernest Augustus of Hanover, who contends, and asks the court to declare, that he is a British subject under the combined effect of two Acts of Parliament. These are, first, the Act 4 & 5 Anne, c. 16 (otherwise c. 4), passed in the year 1705, and intituled " An Act for the naturalization of the Most Excellent " Princess Sophia, Electress and Duchess Dowager of Hanover, " and the issue of her body " (I will refer to it as the Act of Anne); and, secondly, the British Nationality Act, 1948, which came into force on January 1, 1949.

The defendant is Her Majesty's Attorney-General who, while disclaiming any hostility in his attitude to the plaintiff, puts him to proof of his contention, and has assisted the court by advancing or suggesting arguments against it. The case is one of considerable difficulty. There is, on the one hand, in the plaintiff's favour, the apparently clear and unambiguous terms of the enacting provisions of the Act of Anne. On the other hand, the consequences of a literal interpretation and application of those terms are such as to give rise to some serious misgivings as to whether it would be proper so to treat them.

The plaintiff is a descendant of the Electress Sophia, being the great-great-grandson of Ernest Augustus, Duke of Cumberland, the fifth son of King George III. He was born in or near Hanover on March 18, 1914. It is admitted that he is and at all times was of the Protestant religion, and that he is not and never has been a Papist, and has never professed the Popish religion. These expressions are taken from the Act of Anne. There are at the present time a large number of other persons descended from the Electress Sophia and with similar religious associations; the number of such persons is stated to be upwards of 400, and they include members of the royal families of practically every European country. It would therefore seem that my decision in the present case is likely to affect many other persons who would not be technically bound by it. I confess that the case seems to me to be of greater historical interest than it can possibly be of importance either to the plaintiff or to any other person.

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[4] (1774) 1 Cowp. 232.

It is, I think, convenient for me here to state what I understand to be the plaintiff's actual status according to English law, apart from any question as to his nationality, and I take the following particulars mostly from Burke's Peerage, 1953 ed., pp. xxxiii–xli, cvii, cli and clii. Under or by virtue of the Titles Deprivation Act, 1917, and an Order in Council dated March 28, 1919, the plaintiff's father (1887–1953) was deprived of his right to succeed his (the plaintiff's) grandfather (1845–1923) as Duke of Cumberland and Earl of Armagh; but the plaintiff's title of "Prince of Great Britain and Ireland" was in no way affected by this Act or the said Order in Council, nor was his right to be designated "Royal Highness," and there is now vested in him the right under the provisions of the said Act to petition for his restoration to the Roll of the British Peerage.

It is surely significant that neither in 1917 nor at any other time has any attempt been made to deprive the members of the plaintiff's family of their status as British subjects, if, in fact, they possessed or possess that status, which is, of course, the question which I have now to consider. If they were British subjects in 1917, the omission to deal with the situation arising therefrom certainly suggests that they were not then regarded as British subjects. I should add that the plaintiff's right of succession to the Crown, remote though of course it is, is also wholly unaffected by the Act, and it is indeed pointed out in Burke that, apart from any other cogent arguments, it is a well-settled rule of law that even an attainder, "albeit the blood "be corrupted and uninheritable," is automatically void and ended if the person attainted inherits the Crown. It is also pointed out in the same work that under the Act of 1917 and the Order in Council of 1919 the Cumberland peerages have been placed in a position, theretofore unknown in peerage law, of being neither extant, abeyant, dormant or extinct, but (and here was the novelty) merely suspended. The plaintiff is, without question, in the order of succession to the Crown under the Act of Settlement, not only through his paternal ancestry in the line of the Dukes of Cumberland of the creation of George III, but by reason of a nearer, though still very remote, degree of relationship through his mother, who was the daughter of the Kaiser Wilhelm II and, therefore, a great-granddaughter of Queen

Victoria. With his British peerages, in existence though in suspense, his position and style as a Prince of Great Britain and Ireland, and his place in the order of succession to the Crown, all undisputed, it is difficult to see what advantage he would gain from being declared to have been a British subject under the Act of Anne, and so to be a British subject today.

Leaving for the moment the preamble and proviso to it, the enacting provision of the Act of Anne reads as follows: [His Lordship read it and continued:] Now it is, of course, plain that a statute is not impliedly repealed merely by becoming obsolete or by mere non-user, however long the time may have been since it was known to have been actually put into force. See *per* Dr. Lushington in *The India.*[1] But this principle must, in my judgment, be applied with due regard to the circumstances of the case, and although the word "obsolete" cannot in strictness be applied to any Act of Parliament remaining on the Statute Book, there are undoubtedly statutes still to be found there which would seem only to have been permitted to remain there because their existence has been overlooked. The textbooks give instances of this, such as the Act 13 Car. 2, c. 5, which enacts that everyone commits a misdemeanour who procures the signatures of more than 20 persons to a petition to the King or to Parliament without the previous permission of the justices or the grand jury, "which" (said Sir James Stephen's Digest of Criminal Law (1877 ed.), p. xxxi) "obviously exists "only because it is forgotten."

There is, I understand, no record of the Act of Anne ever having been put into any practical operation or referred to or relied on or regarded as relevant in any way and, as was said by Lord Kenyon in *Leigh* v. *Kent*[2]: "where the words of an Act "of Parliament are plain, it cannot be repealed by the non-user, "yet where there has been a series of practice, without any "exception, it goes a great way to explain them where there is "any ambiguity." Many examples of statutes effete or forgotten, though remaining on the Statute Book, are to be found in the textbooks; for instance, trial by battle was still in force in 1819, and drawing and quartering was still part of the sentence for treason until 1870. And, as usage is a good interpreter of law, so non-usage lays an antiquated Act open to any construction weakening or even nullifying its effect. Such considerations as these cannot be excluded in connexion with the Act of Anne.

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[1] (1864) 33 L.J.P.M. & A. 193.

[2] (1789) 3 Term Rep. 362.

Turning for a moment to the British Nationality Act, 1948, by which the Act of Anne was repealed, section 12 provides that a person who was a British subject immediately before the commencement of the Act (namely, January 1, 1949) should on that day become a citizen of the United Kingdom and Colonies, subject to certain exceptions which I need not specify, and there is no doubt to my mind (and the Attorney-General admits) that if the plaintiff was a British subject immediately before January 1, 1949, he did in fact on that date become and now is a British subject under that Act. The question, therefore, which falls to be decided is whether the plaintiff was, or was not, a British subject under the Act of Anne immediately before January 1, 1949. One must just consider, I think, what is involved in the possession of that status. In the first place it involves "allegiance." This, I think, is clear by implication from the proviso of the Act of Anne which enacts that "every person and "persons, who shall be naturalized by virtue of this Act of "Parliament, and shall become a Papist, or profess the Popish "religion, shall not enjoy any benefit or advantage of a natural "born subject of England; but every such person shall be "adjudged and taken as an alien, born out of the allegiance of "the Queen of England, to all intents and purposes whatsoever; "anything herein contained to the contrary notwithstanding."

Now "allegiance" is defined in Termes de la Ley as "Such "natural or legal obedience which every subject owes to his "prince"; and in *Joyce* v. *Director of Public Prosecutions*[3] it was held that an alien under the protection of a British passport owes allegiance to the Crown. Again, Sir William Holdsworth, in the article "Constitutional Law" in Halsbury's Laws of England, 2nd ed., vol. 6, p. 530, writes: "It is said that the "Crown enjoys the right of recalling subjects from abroad by "letters under the Great Seal . . . disobedience thereto formerly "rendering the person's property in the realm liable to seizure . . . "until the recall was complied with. This prerogative, so far as "it is not obsolete, applies, it seems, either in time of war or in "time of peace."

Now, when it is remembered that members of every European royal family, with perhaps one exception, are covered by the literal words of the Act of Anne, it is difficult to see how such obligations as these could ever have been intended to apply to so wide a class of persons. No doubt it may be said that such anomalies must occur in every case of dual nationality, but never, I should suppose, on such a large scale and with such surprising consequences as in this case, if the plaintiff's contention is well founded.

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[3] [1946] A.C. 347; 62 T.L.R. 208; [1946] 1 All E.R. 186.

At the date of the passing of the Act of Anne there were but seven persons besides the Electress herself who were affected by its provisions. These were her son George, afterwards King George I, born May 28, 1660; his two brothers, born in 1666 and 1674 respectively, and three grandchildren, namely, George Augustus, afterwards King George II, born 1683, Sophia Dorothea, born 1685, his sister, and Frederick William, born 1688, son of a deceased daughter of the Electress.

These being the persons immediately covered by the provisions of the Act, what must have been its intention? Not to secure the Protestant succession, which had already been provided for by the Act of Settlement of 1700 (12 & 13 Will. 3, c. 2). It can only be supposed that it was thought advisable and convenient that any of such then existing persons who might succeed to the throne should do so in possession of the status of British nationality. If such were in fact its purpose, it became at an early date entirely superfluous, when the number of those in the succession who were British subjects by birth had reached such numbers that the succession of an alien-born descendant had become only a remote possibility.

It now becomes necessary to look at the preamble of the Act of Anne and to see whether it throws any light on the matter and, secondly, to consider whether it is legitimate to have recourse to it on a question of construction, notwithstanding the general rule that a preamble cannot be used to control an enactment expressed in clear and unambiguous terms: see *Powell* v. *Kempton Park Racecourse Co.*[4]

Craies on Statute Law, 5th ed., p. 189, does state that "If "very general language is used in an enactment, which it is "clear must have been intended to have some limitation put "upon it, the preamble may be used to indicate to what par- "ticular instances the enactment is intended to apply." And, among other examples given at pp. 189–192 of that work, he cites *Brett* v. *Brett*,[5] where it was held that, inasmuch as it clearly appeared from the preamble, the Act 25 Geo. 2, c. 6, only professed to deal with wills and codicils devising real estate, the expression "any will or codicil" whenever used in the enacting words of the statute did not include a will or codicil bequeathing personalty.

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[4] [1899] A.C. 143.

[5] (1826) 3 Add. 210, 219.

Now the preamble in the present case, after reciting the effect of the Act of Settlement, and after some complimentary words to the Queen, proceeds: "To the end the said Princess Sophia "Electress and Duchess Dowager of Hanover and the issue of "her body and all persons lineally descending from her may be "encouraged to become acquainted with the laws and constitu-"tions of this realm it is just and [highly] reasonable that they "in Her Majesty's lifetime (whom God long preserve) should be "naturalized and be deemed taken and esteemed natural born "subjects of England."

The words "in Her Majesty's lifetime" seem to suggest some temporary purpose in the Act, but the indication is certainly very vague. If these words had followed the words "descending from "her," there would have been an end of the plaintiff's case. But, of course, no such transposition is admissible. To the question put to the plaintiff, on the assumption that he establishes his case, "Were you naturalized in the lifetime of Queen "Anne?" neither an affirmative nor a negative answer would be otherwise than ambiguous. He would say that in a sense he was, and in a sense he was not. And that leads me rather to the supposition that the main object of the Act was to make sure that whichever of the foreign born and alien-tongued persons who would be proclaimed, crowned and enthroned as the Queen's immediate or next proximate successors, should have already become subjects of England. No doubt the enacting portion of the statute might operate according to its literal expressions to the remotest point of time, but that it had any such far-reaching purpose is very difficult to believe. To suppose that Parliament thought that every descendant, however remote in time or distant in kinship of the Electress, ought to study English law is really rather absurd, however salutary the topic would have been to the immediate successors of Queen Anne. Even in its primary purpose the Act of Anne achieved a very poor measure of success, for it is notorious that King George I never learnt to speak the English language, and is not, I believe, thought to have possessed much knowledge of English law.

There have been plenty of Statute Law Revision Acts since 1861, and the question may naturally be asked why this Act, if it was, in fact, as I consider it was, entirely spent, was not repealed like so many others contemporaneous with it. I think the answer may be that such revising Acts usually contain clauses preserving and safeguarding vested rights, and reluctance may have been felt to the repeal of an Act such as the Act of Anne, which appeared at first sight on one possible construction of it to confer privileges on a large number of persons, whose opinions would have been difficult to discover and whose consent would have been difficult to obtain. It is well known that the descendants of a particular stock may in a fairly brief period of time become almost uncountable. For example, it is said that there are at least one hundred thousand persons in England who can prove descent from King Edward III (see Marquis de Ruvigny's Plantagenet Roll, Mortimer-Percy Volume I, p. xi), and it may not be very long before those who can prove descent from the Electress Sophia will be equally or nearly as numerous. When that event happens, the operation of the Act of Anne would be not merely inconvenient but absurd, and one of the questions which I have tried to consider is whether it had not already reached that point long before January 1, 1949. If over 400 persons, including members of nearly all the Royal Houses of Europe, were already just before January 1, 1949, naturalized by the Act of Anne, it seems to me that at least one provision of the laws of our country had become little short of ridiculous. If, then, the very general language of the Act of Anne was intended to have some limitation put on it, the preamble may surely be used to indicate what that limitation ought to be, and, slight though the indication is, it seems to me that the reference to Queen Anne's lifetime makes the preamble what preambles have been described as being, a "key to the "Statute," and indicates that what the legislature was doing was to make sure that every possible successor to the throne within sight, as it were, was ready, as a naturalized Englishman or Englishwoman, to take the Queen's place on her death. I accept the words of Parker C.B. in *Ryall* v. *Rowles*,[6] where he says that "If the non-restraining the generality of an enacting "clause will be attended with an inconvenience, the preamble "shall restrain it."

Now I think that if the generality of the enacting clause in the Act of Anne is not restrained, it would lead to a conclusion which would certainly be inconvenient and also, I think, absurd, seeing that an appreciable part of the inhabitants of Europe would be invested without their consent and for the most part without their knowledge with British citizenship. The Act was, in my judgment, not repealed before, because the extent of its application was doubtful and because its repeal might have interfered with vested rights. If I am right in thinking that its application was limited in point of time, i.e., that it did not affect descendants of the Electress born after the death of Queen Anne, there was neither any need to repeal it nor any harm in leaving it on the Statute Book. It was there, in my view, as an interesting historical document and nothing more.

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[6] (1750) 1 Atk. 164.

I have come, with a good deal of hesitation, to the conclusion that the enacting words, though unqualified and plain in their meaning, when standing alone, are nevertheless of such a character and produce inevitably such consequences that the legislature must have intended to put some limit on their operation. When once this conclusion is reached, the question arises: what limit? And then one turns to the preamble and one finds (though only, I agree, by implication) that the purpose of the enactment was a purpose to be effected not indefinitely at some future time or times, but in the lifetime of Queen Anne herself, and in consequence I think that the plaintiff is not entitled to the relief which he seeks. Let me say that I have every reason to believe that he, the plaintiff, who was educated at Oxford, is a friend to this country, proud of his long descent as a member of its ancient Royal house, and anxious to assert and emphasize his association with it by establishing, if he could, a right to the status of a British subject. That is an ambition, however, which can, perhaps, be satisfied by other means, which avoid implicating in its consequences a large number of persons who neither want nor would value for themselves the status of British nationality which he claims.

There are other examples of possession of a particular status by persons who are unaware of it or take no interest in it, or choose completely to ignore it. For example, until quite recently, every King's or Queen's Counsel was a Governor of Queen Anne's Bounty, though few of them were aware of the fact. There are also examples of citizenship being conferred on a man and his heirs, an expression which would probably not include all his descendants. I should like here to acknowledge my indebtedness to the courtesy of Professor Arthur Goodhart, who, from his stores of knowledge, both of law and of history, has supplied me with a reference to a letter written by George Washington to the Marquis de Lafayette on December 23, 1784, informing him that he and his heirs male had been made citizens of the State of Maryland, which carried with it the status of national citizenship when the United States Constitution came into force. See the Writings of George Washington, United States Government Printing Office, vol. 28, p. 17, where there is a note that the Marquis de Lafayette was also made a citizen of Virginia. Professor Goodhart tells me that he also knows French citizens who possess American nationality conferred on an ancestor and his descendants.

I mention these matters in order to show that the plaintiff's contentions are not without precedent or support and, indeed, as I have said, the case seems to me to be difficult; but the examples of dual nationality, which undoubtedly do exist, give rise to so many anomalies and sources of confusion that their number ought not to be extended further than is necessary. It is, I think, very significant indeed that, while in the wars 1914–18 and 1939–45 so many of the descendants of the Electress were engaged in hostile operations against this country, nothing at all was done to denationalize those persons and so to regularize their position. If it is wrong to say that the Act of Anne or any other Act has "become obsolete," the necessity for any such statement in the present case does not seem to me to arise, for I construe the Act of Anne in a way which results in saying that its purpose has been fulfilled and its operation brought to an end, and that it is in fact, and in point of law, entirely spent.

I will not dismiss the action but, more conveniently, make a negative declaration that the plaintiff was not, immediately before the coming into force of the British Nationality Act, 1948, a British subject and that he is not now, either by virtue of that Act or otherwise, a British subject, to any intent or for any purpose. I am glad to know that the parties have relieved me from having to say anything about the costs of this action.

Declaration accordingly.

Solicitors: *Farrer & Co.; Treasury Solicitor.*

J. L. D.

INLAND REVENUE COMMISSIONERS *v.* BUTTERLEY CO. LD.

C. A.

1955
Feb 8, 9, 10, 11;
Mar. 10.

Evershed M.R., Jenkins and Morris L.JJ.

Revenue—Profits tax—Separate trades—Nationalized industry—Company carrying on colliery undertaking and other separate trades—Colliery undertaking nationalized—Compensation—Interim income payments—"Profits arising from the trade or business"—Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *Sch. IV, para.* 7—*Coal Industry Nationalization Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 59), *ss.* 19, 22 (2), (3) (4)—*Finance Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *ss.* 31, 32, 43—*Coal Industry* (*No.* 2) *Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 79), *s.* 1 (2).

Mines and Minerals—Coal—Nationalization.

By section 19 (1) of the Coal Industry Nationalization Act, 1946, compensation on the transferred assets was "due on the "primary vesting date [January 1, 1947], subject to determination "of the amount . . ." Section 19 (2) and section 22 provided a right to "interim income" or to "revenue payments" for the period between "the primary vesting date and the date on which "any such compensation is fully satisfied . . ." Payments were to be calculated for the years 1947 and 1948 under section 22 (3) of the Act and for the year 1949 under section 1 (2) of the Coal Industry (No. 2) Act, 1949, payment under both these heads being termed "revenue payments"; payments made subsequently to these years were to be calculated in accordance with section 22 (2) of the Act of 1946 and were called "interim payments."

The appellant company carried on a number of businesses, including a colliery undertaking. On January 1, 1947, the assets of their colliery undertaking vested in the National Coal Board under the Act of 1946; and during the years 1947–50 they received "interim income" or "revenue" payments under section 19 (2) calculated in accordance with section 22 (2) and (3) of the Act of 1946 and section 1 (2) of the Act of 1949. These sums were included in the computation of their profits for the purposes of their assessments to profits tax. The Special Commissioners discharged the assessment so far as these sums were included.

Roxburgh J. reversed their decision. On appeal:—

Held, (1) that the interim income or revenue payments under the Acts of 1946 and 1949, whether they were or were not income received from property, were only chargeable to profits tax if they were profits of a trade or business carried on by the company during the relevant accounting periods; (2) that the Special Commissioners having found, as a fact, that the company's colliery undertaking constituted a trade separate from its other trades and the colliery undertaking having ceased on January 1, 1947, the interim income or revenue payments could not be profits arising from the colliery undertaking nor could they be imputed to be profits of the trades of the company which were carried on by the company after that date; (3) that the quality of the interim income or revenue payments under the Acts of 1946 and 1949 fell to be determined at the time of receipt: the fact that the company, after their receipt, used them in the continuing trades could not alter retrospectively the character of the payments at the time of their receipt; and, accordingly, that upon the true construction of the Finance Acts, 1937 and 1947, the interim income or revenue payments were not subject to profits tax.

Inland Revenue Commissioners v. *Gas Lighting Improvement Co. Ld.* [1923] A.C. 723; 12 T.C. 503 and *Inland Revenue Commissioners* v. *Tootal Broadhurst Lee Co. Ld.*, 29 T.C. 352; [1949] 1 All E.R. 261 considered.

The question whether the interim income payments were "income "received from . . . property" within paragraph 7 (1) of Schedule IV to the Finance Act, 1937, as amended by the Finance Act, 1947, considered but not decided.

Decision of Roxburgh J. [1954] 1 W.L.R. 1199; [1954] 3 All E.R. 69 reversed.

APPEAL from Roxburgh J.

The appellant company, Butterley Co. Ld., was formed in 1888 and carried on a number of trades which included coal mining. On January 1, 1947, the assets of the company employed in its colliery undertaking vested in the National Coal Board under section 5 (1) of the Coal Industry Nationalization Act, 1946, the date appointed by the Minister as the "primary "vesting date." After that date the company ceased to carry on its colliery undertaking, but it continued to carry on its other trades.

Compensation payable on the assets transferred to the board was by section 19 (1)[1] of the Act declared to be "due on the

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[1] Coal Industry Nationalization Act, 1946, s. 19: "(1) Compensation "in respect of a transfer of transferred interests or of an overhead "expenses increase shall be due on "the primary vesting date, subject to "determination of the amount thereof.

"(2) For the period between the "primary vesting date and the date "on which any such compensation is "fully satisfied, there shall be a right "to interim income, to be satisfied in "accordance with the provisions of "section 22 of this Act.

"(3) Provision may be made by "regulations for authorizing the partial satisfaction of such compensation before the determination of "the amount thereof has been completed."

S. 22: "(1) The right conferred by "subsection (2) of section 19 of this "Act to interim income for the period "between the primary vesting date "and the date of the satisfaction in "full of compensation in respect of a "transfer of transferred interests, or "of an overhead expenses increase, "shall be satisfied in accordance with "the provisions of this section.

"(2) Subject to the provisions of "subsections (3) and (4) of this section as to the revenue payments "therein mentioned,—(a) the said "right conferred by subsection (2) "of section 19 of this Act shall be "satisfied, so far as regards interim "income for the period between the "primary vesting date and the time "when any amount of compensation "in respect of a transfer of transferred interests or of an overhead "expenses increase is satisfied, by "making, in addition to the issue of

C. A.
1955

INLAND REVENUE COMMISSIONERS
v.
BUTTERLEY CO. LD.

"primary vesting date, subject to determination of the amount thereof." Section 19 (2) gave a right to payment of "interim income" between the primary vesting date (January 1, 1947), and the date on which the compensation was fully satisfied.

The company received assessments in respect of the years 1947–50 which included in its liability to profits tax interim payments under section 19 (2) calculated in accordance with section 22 (2) and section 22 (3) of the Act of 1946, and with section 1 (2) of the Coal Industry (No. 2) Act, 1949,[2] and termed

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"the stock then issued in satisfaction of that amount of compensation or to the making of the money payment then made in satisfaction of that amount of compensation, as the case may be, a money payment of an amount equal to interest for that period on that amount of compensation at such rate or rates as may be prescribed . . . (*b*) the provisions of section 20 of this Act as to the legal and beneficial title to compensation shall have effect in relation to additions to compensation under this subsection, . . .

"(3) The following provisions of this subsection shall have effect as to the making to colliery concerns, . . . of payments in respect of each of the two years beginning with the primary vesting date and the first anniversary thereof respectively, that is to say,—(*a*) a colliery concern . . . shall be entitled in respect of each of the said two years to a payment of an amount equal to one half of the comparable ascertained revenue of the concern, . . . attributable to activities thereof for which the transferred interests thereof were used or owned; (*b*) the payments to be made under the last preceding paragraph are in this section referred to as 'revenue payments,' and shall be money payments.

"(4) The provision made by the last preceding subsection shall be deemed, in the case of any colliery concern . . . to be in substitution for the provisions of subsection (2) of this section, so far as regards additions thereunder for the said two years or any part thereof to compensation for a transfer of transferred interests being compensation attributable to transferred interests of that concern . . . except as to any excess of the aggregate amount of such additions over the aggregate amount of the revenue payments of that concern."

[2] Coal Industry (No. 2) Act, 1949, s. 1: "(1) The following provisions of this section shall have effect with respect to the making to colliery concerns, . . . of payments in respect of the year 1949 and subsequent years towards satisfaction of the right to interim income conferred by subsection (2) of section 19 of the Coal Industry Nationalization Act, 1946 . . .

"(2) A colliery concern . . . shall, in respect of the year 1949 and in respect of any subsequent year before that in which compensation under the principal Act in respect of the transfer of the transferred interests of the concern . . . is satisfied in full, be entitled to a payment of an amount equal to the amount by which one third of the comparable ascertained revenue of the concern, . . . attributable to activities thereof for which the transferred interests thereof were used or owned exceeds an amount equal to interest for the year in question on the aggregate amount of that compensation satisfied before the end of that year. . . .

"(3) A payment to which a colliery concern . . . is entitled under the last foregoing subsection in respect of any year shall be treated for the purposes of paragraph (*a*) of subsection (2) of section 22 of the principal Act as being made towards for the years 1947–49 "revenue payments." The company appealed to the Special Commissioners from those assessments on the ground that they were wrongly included in the computation of its profits for the purposes of profits tax.

The commissioners allowed the appeal and held: (1) that the payments under the Coal Acts of 1946 and 1949 were not properly included in computing the profits of the company for the purposes of profits tax; (2) that all the payments in issue constituted income of the company; (3) that on the evidence before them the company's composite trade or business consisted at the material times of a number of separate and severable trades, of which its colliery concern was one; and that that trade ceased entirely on January 1, 1947; (4) that in view of their finding under head (3) the payments were not receipts of any trade carried on by the company during the relevant chargeable accounting periods, because it had ceased to carry on its colliery trade on January 1, 1947; (5) that on a proper construction of sections 19 (2) and 22 of the Act of 1946, section 1 of the Act of 1949 and paragraph 7 (1) of Schedule IV to the Finance Act, 1937,[3] as amended by section 32 (1) of the Finance Act,

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"satisfaction of the aggregate of the "proportions attributable to that year "of amounts which that paragraph "requires to be paid as additions to "stock issued or money payments "made after the expiration of that "year in satisfaction of compensation "in respect of transfers of transferred "interests of the concern. . . .

"(5) The Minister shall have power, ". . . by statutory instrument . . . "to make regulations . . . for requiring the repayment to the Minister "of any amount by which a payment "made under this section in respect "of any year to a colliery concern . . . "may exceed the aggregate towards "satisfaction of which that payment is "under subsection (3) of this section "to be treated as being made, . . . "Provided that . . . provision shall "be made for setting off against the "deduction the aggregate of (*a*) . . . "and (*b*) an amount which bears to "the amount of the deduction the same "proportion that the amount of profits "tax ultimately borne by the concern ". . . (as determined in accordance "with rules laid down by the regulations) in respect of the aggregate (as "so determined) of its profits which "are attributable to the year in "respect of which the excess arises "bears to that aggregate."

[3] Finance Act, 1937, s. 19: "(1) "There shall be charged, on the profits "arising in each chargeable accounting period falling within . . . from "any trade or business to which this "section applies a tax (to be called "the 'national defence contribution') "of an amount equal to . . .

"(2) Subject as hereafter provided, "the trades and businesses to which "this section applies are all trades or "businesses of any description carried "on in the United Kingdom, or carried "on, whether personally or through "an agent, by persons ordinarily "resident in the United Kingdom."

S. 20: "(1) For the purpose of the "national defence contribution, the "profits arising from a trade or business in each chargeable accounting "period shall be separately computed, "and shall be so computed on income "tax principles as adapted in accordance with the provisions of the

1947,[4] the payments were not "income received from invest-"ments or other property"; (6) that the assessments should be reduced so far as they included those sums.

The Crown appealed from that decision.

Roxburgh J. reversed the decision of the Special Commissioners, holding that the interim income payments were "income "received from . . . other property" within paragraph 7 of Schedule IV of the Finance Act, 1937 (as amended), and should therefore be included in the company's profits for the purposes of profits tax.

The company appealed.

Charles Russell Q.C., *John Senter Q.C.* and *Desmond C. Miller* for the company. The company does not now contend that the interim income and revenue payments under the Coal Acts of 1946 and 1949 are not income, but contends that these payments are not profits of a trade or business carried on by the company

"Fourth Schedule to this Act. For "the purpose of this subsection, the "expression 'income tax principles' "in relation to a trade or business "means the principles on which the "profits arising from the trade or "business are computed for the pur-"pose of income tax under Case I of "Schedule D, or would be so com-"puted if income tax were chargeable "under that Case in respect of the "profits so arising."

Sch. IV, para. 7: "Income received "from investments or other property "shall be included in the profits in "the cases and to the extent provided "in this paragraph, and not other-"wise . . ."

Para. 8: "Subject to the provisions "of the last foregoing paragraph, the "profits shall include all such income "arising from the trade or business "as is chargeable to income tax under "Case I of Schedule D, or would be "so chargeable if the profits of the "trade or business were chargeable "under that Case, except . . ."

[4] Finance Act, 1947, s. 31: "(2) "The said section 19 [of the Finance "Act, 1937] shall not apply to any "trade or business carried on by a "body corporate during any charge-"able accounting period if, for a year "or period which includes, or for years "or periods which together include, "the whole of the chargeable account-"ing period, the actual income of "the body corporate from all sources "is apportioned under or for the "purposes of section 21 of the "Finance Act, 1922, and all the per-"sons to whom it is apportioned are "individuals."

S. 32: "(1) For sub-paragraph "(1) of paragraph 7 of the Fourth "Schedule to the Finance Act, 1937, "there shall be substituted the follow-"ing sub-paragraphs: 7 (1) Income "received from investments or other "property shall be included in the "profits except . . ."

S. 43: "(1) All trades or businesses "to which section 19 of the Finance "Act, 1937, applies carried on by the "same person shall be treated as one "trade or business for the purposes "of the enactments relating to the "profits tax. . . ."

S. 47: "(1) Subject to the provi-"sions of this section, the provisions "of this Part of this Act relating to "the profits tax shall have effect with "respect to all chargeable accounting "periods any part of which falls after "the end of the year 1946."

after 1946 and accordingly that they are not subject to profits tax. Neither the interim income nor yet the revenue payments can be accurately called income received in respect of the right to compensation. The revenue payments for the years 1947 and 1948 payable under section 22 (3) of the Act of 1946 bear no relation to the sum ultimately payable for compensation, and the revenue payments payable under the Act of 1949 for the year 1949 and subsequent years are liable to be repaid if they exceed the sum ultimately found to be payable. These payments, while income of the recipient for income tax purposes, are not income received from property. The compensation does not become income bearing property until the compensation stock is issued. The payments are additional compensation. Roxburgh J. was wrong in his decision on the point: *Glenboig Union Fireclay Co. Ld.* v. *Inland Revenue Commissioners.*[5] The fact that under section 22 (2) of the Act of 1946 the right to interim income is to be a payment equal to "interest" on the compensation does not make the payment interest of that compensation. Where legislation gives a right to interest on compensation a different formula is used: see the War Damage Act, 1943, s. 10 (5), and the Transport Act, 1947, s. 32 (2). [Reference was also made to the Law Reform (Miscellaneous Provisions) Act, 1934, and to *Riches* v. *Westminster Bank Ld.*[6]]

The Finance Act, 1937, as amended by the Finance Act, 1947, imposes what is now profits tax on the profits arising from any trade or business and, under the Act of 1947, where more than one trade is carried on they are treated as one trade or business for the purposes of the tax. These receipts cannot be profits of any trade, and it follows that they are not subject to the charge imposed by section 19 (1) of the Finance Act, 1937. No charge is imposed on the income of investments which do not form part of the investments of a relevant trade: *Inland Revenue Commissioners* v. *Gas Lighting Improvement Co. Ld.*[7]; *Inland Revenue Commissioners* v. *Tootal Broadhurst Lee Co. Ld.*[8] The reference in the Coal Act of 1949 to profits tax cannot alter the construction of the Act of 1946 unless that statute is ambiguous: *Hudson (John) & Co. Ld.* v. *Kirkness (Inspector of Taxes)*[9]; *Inland*

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[5] (1922) 12 T.C. 427.

[6] [1947] A.C. 390; 63 T.L.R. 211; [1947] 1 All E.R. 469.

[7] (1923) 12 T.C. 503; [1923] A.C. 723.

[8] (1949) 29 T.C. 352; [1949] 1 All E.R. 261.

[9] [1954] 1 W.L.R. 40; [1954] 1 All E.R. 29.

Revenue Commissioners v. *Dowdall O'Mahoney & Co. Ld.*[10]; *Camille and Henry Dreyfus Foundation Inc.* v. *Inland Revenue Commissioners.*[11] The Crown's contention amounts to a claim to levy profits tax on all the income from all sources of a trading company. That claim is unjustified.

John Senter Q.C. following. Profits tax is a separate tax from income tax. It is submitted, first, that the sums are not within the words of charge. Second, that there is a concluded finding of fact against the Revenue that these payments did not arise from a trade or business of the company. It cannot be said that payment in respect of an expropriated trade is profits of a trade or business. [Reference was made to *Liverpool and London and Globe Insurance Co.* v. *Bennett (Surveyor of Taxes)*[12] and *Hillerns and Fowler* v. *Murray (Inspector of Taxes).*[13]]

Sir Reginald Manningham-Buller Q.C., A.-G., Geoffrey Cross Q.C. and *Sir Reginald Hills* for the Crown. It is submitted first that these payments represent interest on a debt and are income from property. A debt is a chose in action and, until the debt is paid, the interest received is income. If the Act of 1946 had said nothing about interim income, an obligation to pay interest from the date when possession was taken of the colliery business would be inferred. All that section 19 of the Act of 1946 does is to make express provision for payment of interest. The payments are income of the compensation moneys and not separate compensation.

If that is wrong, it is submitted that these payments are income and are chargeable to profits tax under paragraph 8 of Schedule IV of the Finance Act, 1937, which brings into charge all income from a trade or business. Under paragraph 7 (as amended) such income includes all income from investments with certain exceptions. These exceptions do not apply.

The real dispute here is whether these payments are income from a trade or business. In fact these moneys have been used for the purposes of the company's other trades. The position might have been different if they had been segregated. The payments are income of the continuing business. The position has been complicated by the fact that paragraph 7 originally excluded all investment from the scope of the tax. The Act of

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[10] [1952] A.C. 401; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531; 33 T.C. 259.

[11] [1954] Ch. 672; [1954] 2 All E.R. 466.

[12] [1913] A.C. 610; 6 T.C. 327.

[13] (1932) 17 T.C. 77; 48 T.L.R. 213.

1947 cut the exemption down and investments were brought within the scope of the tax. Under paragraph 8 all income from the trade or business is brought within the charge. These payments are admittedly income; they are accordingly within the charge. It is not possible to equate income from a trade or business with trading receipts. Income from investments used in the company's business is income. That appears from *Inland Revenue Commissioners* v. *Tootal Broadhurst Lee Co. Ld.*[14] A company cannot avoid the tax by segregating part of its assets; since the Act of 1947 was passed substantially the whole income of a company is subject to profits tax. [Reference was made to *Chamney* v. *Lewis*.[15]]

Sir Reginald Hills following. It is a novel argument that a company can isolate part of its income. Profits tax is leviable on a company's whole income. "Income arising from a trade "or business" should be construed as meaning "income arising "in the course of the trade or business." These payments were treated as part of the company's income. The Act of 1947, which expressly refers to profits tax, cannot be ignored since there is ambiguity here: *Camille and Henry Dreyfus Foundation Inc.* v. *Inland Revenue Commissioners*.[16]

Charles Russell Q.C. in reply. The *Camille Dreyfus* case[16] does not assist the Crown, since it is not possible to say that the Coal Act of 1949 is in pari materia with the Finance Acts. The Crown is saying that any income of any company from any source is liable to profits tax. That is not in accordance with the language of the Acts of 1937 and 1947. The Crown is also wrong in its contention that whether an income payment is subject to profits tax or not depends on what is done with it. Its liability to this tax is determined at the moment a payment is received. These payments are not payments of a trade or business and accordingly are outside the scope of the tax.

Cur. adv. vult.

March 10. The following judgments were read.

EVERSHED M.R. As Roxburgh J. observed at the beginning of his judgment, this case is concerned with the claim by the Crown to profits tax in respect of sums, now admittedly income for income tax purposes, received by the Butterley Co. Ld. in the years 1947 and following, from the Minister of Fuel of three kinds, namely, (1) revenue payments in respect of the years 1947 and 1948 under section 22 (3) of the Coal Industry Nationalization Act, 1946 (which I shall hereafter sometimes call the Coal Act, 1946); (2) revenue payments in respect of the years 1949 and 1950 under section 1 of the Coal Industry (No. 2) Act, 1949 (which I shall hereafter sometimes call the Coal Act, 1949); and (3) other sums paid under section 22 (2) of the Coal Act, 1946; in satisfaction or part satisfaction of the right to interim income conferred by section 19 (2) of the last-mentioned Act. Although the payments are of the three kinds I have indicated, all of them were in respect of the right to interim income under section 19 (2) of the Coal Act, 1946. So far as class (3) above is concerned, these were expressly paid towards satisfaction of that right. The revenue payments, on the other hand, are expressed in the statute to be "in substitution for" what may be called the primary right under the Act of 1946. The revenue payments under the Act of 1949 also differed from those under the Act of 1946 in that, if the former were found to exceed what would be payable strictly by way of interim income under section 19 (2) of the Act of 1946 for the given year, the recipient would be liable to be made to recoup.

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[14] 29 T.C. 352.

[15] (1932) 17 T.C. 318.

[16] [1954] Ch. 672.

Notwithstanding the above difference, it is, to my mind, clear that the Crown's claim to tax should wholly fail or wholly succeed. There is, in my judgment, no sensible distinction between any of the three types of payment for present purposes, and no suggestion to that effect was made in the course of the argument on either side.

The scheme of the Coal Act, 1946, is well known and I shall not take time in describing its general nature. It provided for the transfer, on what was called the primary vesting date—a date which was later fixed as January 1, 1947—to the National Coal Board of the business assets, and other assets called overhead expenses increases, of the component parts then existing of the coal industry. For the assets so transferred compensation was provided under the Act to the components in the industry, of which the Butterley Co. was one.

I can, with that introduction, turn at once to section 19 of the Coal Act, 1946, which, by subsection (1), provides: "Compensation in respect of a transfer of transferred interests or of "an overhead expenses increase shall be due on the primary "vesting date"—that is January 1, 1947—"subject to determination of the amount thereof." I pause to state that the method of determining the amount was of a complex nature, and made it clear that a considerable time would elapse before it was, in fact, finally determined.

Subsection (2): "For the period between the primary vesting "date and the date on which any such compensation is fully "satisfied, there shall be a right to interim income, to be satisfied "in accordance with the provisions of section 22 of this Act."

Subsection (3): "Provision may be made by regulations for "authorizing the partial satisfaction of such compensation"—that is, the principal compensation—"before the determination "of the amount thereof has been completed."

Section 20 was concerned with the persons to whom the compensation should be transferred, made over or paid; and section 21 provided for the mode of satisfaction of what I have called the principal compensation which substantially, though not exclusively, was to be by way of Government stock.

I then come to section 22, which picks up, it will be recalled, subsection (2) of section 19. By section 22 (1): "The right "conferred by subsection (2) of section 19 of this Act to interim "income for the period between the primary vesting date and "the date of the satisfaction in full of compensation in respect "of a transfer of transferred interests, or of an overhead expenses "increase, shall be satisfied in accordance with the provisions of "this section. (2) Subject to the provisions of subsections (3) and "(4) of this section as to the revenue payments therein mentioned—(*a*) the said right conferred by subsection (2) of section "19 of this Act shall be satisfied, so far as regards interim income "for the period between the primary vesting date and the time "when any amount of compensation in respect of a transfer of "transferred interests or of an overhead expenses increase is satisfied, by making, in addition to the issue of the stock then issued "in satisfaction of that amount of compensation or to the making "of the money payment then made in satisfaction of that "amount of compensation, as the case may be, a money payment "of an amount equal to interest for that period on that amount of "compensation at such rate or rates as may be prescribed . . . "(*b*) the provisions of section 20 of this Act as to the legal and "beneficial title to compensation"—that is, in effect, a reference to the persons who would be the recipients—"shall have effect in "relation to additions to compensation under this subsection"—with a substitution not material to be read.

Subsection (3) introduces the revenue payments. It is, so far as is material, thus: "The following provisions of this subsection "shall have effect as to the making to colliery concerns . . . of "payments in respect of each of the two years beginning with "the primary vesting date and the first anniversary thereof "respectively, that is to say—(*a*) a colliery concern . . . shall be "entitled in respect of each of the said two years to a payment "of an amount equal to one half of the comparable ascertained "revenue of the concern . . . attributable to activities thereof for "which the transferred interests thereof were used or owned; "(*b*) the payments to be made under the last preceding paragraph are in this section referred to as 'revenue payments', "and shall be money payments."

Paragraph (*c*) provides for the determination of what is called in (*a*) "the comparable ascertained revenue"; it is a sum which is to be derived not from the amount of compensation, but from the previous relevant trading activities of the concern. I will pause here to state what is perhaps the obvious. Since, as I have already indicated, the amount of the compensation could not in the nature of events be finally determined quoad any concern for a considerable time, it followed that the amount of interim income under section 22 (2) was, before determination, incapable of calculation. The revenue payments were, therefore, plainly devised to fill that gap.

Subsection (4) is important for the language which it uses: "The provision made by the last preceding subsection shall be "deemed, in the case of any colliery concern . . . to be in "substitution for the provisions of subsection (2) of this section, "so far as regards additions thereunder for the said two years "or any part thereof to compensation for a transfer of transferred "interests being compensation attributable to transferred interests "of that concern . . . except as to any excess of the aggregate "amount of such additions over the aggregate amount of the "revenue payments of that concern."

I shall return to that language, but, for present purposes, it is sufficient to point out that this section provided that revenue payments would go in satisfaction or towards satisfaction of interim income, but that, if it turned out that they exceeded the interim income, when properly calculated, there was no obligation upon the concern to make repayment.

Section 1 of the Coal Act, 1949, extended, in effect, the provisions for revenue payments, no doubt because, the first two years having passed without the compensation having been finally ascertained, it was thought necessary to fill the further gap which resulted. Section 1 (1) provides: "The following provisions of "this section shall have effect with respect to the making to "colliery concerns . . . of payments in respect of the year 1949 "and subsequent years towards satisfaction of the right to interim "income conferred by subsection (2) of section 19 of the Coal "Industry Nationalization Act, 1946, . . . (2) A colliery concern ". . . shall, in respect of the year 1949 and in respect of any "subsequent year before that in which compensation under the "principal Act in respect of the transfer of the transferred "interests of the concern . . . is satisfied in full, be entitled to a "payment of an amount equal to the amount by which one third "of the comparable ascertained revenue of the concern . . . "attributable to activities thereof for which the transferred "interests thereof were used or owned exceeds an amount equal "to interest for the year in question on the aggregate amount of "that compensation satisfied before the end of that year."

By subsection (3): "A payment to which a colliery concern ". . . is entitled under the last foregoing subsection in respect "of any year shall be treated for the purposes of paragraph (*a*) "of subsection (2) of section 22 of the principal Act as being "made towards satisfaction of the aggregate of the proportions "attributable to that year of amounts which that paragraph "requires to be paid as additions to stock issued or money "payments made after the expiration of that year in satisfaction "of compensation in respect of transfers of transferred interests "of the concern."

Subsection (5) contains the power (which I have already anticipated) whereby, if the revenue payments under this Act proved to exceed the interim income properly attributable to the same period, there is a liability to recoup; thus the regulations made by the Minister may provide "for requiring the repayment "to the Minister of any amount by which a payment made under "this section in respect of any year to a colliery concern . . . may "exceed the aggregate towards satisfaction of which that pay"ment is under subsection (3) of this section to be treated as "being made."

There follows a proviso which has some significance and relates to certain deductions, which may be made against the aggregate which I have just mentioned. The second one (for it is convenient to take them in reverse order) is: "(*b*) an amount "which bears to the amount of the deduction the same propor"tion that the amount of profits tax ultimately borne by the "concern . . . (as determined in accordance with rules laid "down by the regulations) in respect of the aggregate (as so "determined) of its profits which are attributable to the year in "respect of which the excess arises bears to that aggregate." The previous paragraph (*a*) relates to an amount in regard to income tax calculated by a similar method.

The tax now known as profits tax was originally imposed in the year 1937 sub nomine "national defence contribution." Section 19 (1) of the Finance Act, 1937, stated: "There shall be "charged, on the profits arising in each chargeable accounting "period falling within"—and there is named a period which was subsequently extended—"a tax (to be called the 'national "'defence contribution') of an amount equal to" the percentage therein named.

I should state now for simplicity hereafter that for present purposes the chargeable accounting periods are from January 1 to December 31 in each year.

By subsection (2): "Subject as hereafter provided, the trades "and businesses to which this section applies are all trades "or businesses of any description carried on in the United "Kingdom, or carried on, whether personally or through an "agent, by persons ordinarily resident in the United Kingdom." No question has been raised that the business activities of this company, at all relevant times, were businesses within the scope of that subsection.

Section 20, relating to computation, provided in subsection (1): "For the purpose of the national defence contribution, the "profits arising from a trade or business in each chargeable "accounting period shall be separately computed, and shall be so "computed on income tax principles as adapted in accordance "with the provisions of the Fourth Schedule to this Act. For "the purpose of this subsection, the expression 'income tax "'principles' in relation to a trade or business means the "principles on which the profits arising from the trade or business "are computed for the purpose of income tax under Case I of "Schedule D, or would be so computed if income tax were charge- "able under that Case in respect of the profits so arising": that is, arising from the trade or business.

I now turn to Schedule IV. Paragraph 7 (which subsequently became, by a later amendment, sub-paragraph 1 of paragraph 7) provided: "Income received from investments or other property "shall be included in the profits in the cases and to the "extent provided in this paragraph, and not otherwise." Then there followed (*a*) what should be included in the case of the business of a building society or certain other businesses, and (*b*) what should be included in the case of any other trade or business, being a trade or business carried on by a body corporate. Putting it quite briefly, the form of the paragraph in its original shape was that income from investments should only be included in certain limited cases and otherwise should be excluded.

Paragraph 8 provided: "Subject to the provisions of the last "foregoing paragraph, the profits shall include all such income "arising from the trade or business as is chargeable to income "tax under Case I of Schedule D, or would be so chargeable if "the profits of the trade or business were chargeable under that "Case, except" certain cases there mentioned. That language picks up, it will be recalled, the language of section 20 (1).

The tax was substantially amended and renamed "profits "tax" by the Finance Act, 1947. Further, by that Act individuals and partnerships (with certain limited exceptions) were wholly exempted from the tax.

I will read section 31 (2) of the Act of 1947, because some emphasis was laid upon certain of its language in the course of the argument; it provides: "The said section 19"—that is section 19 of the Finance Act, 1937—"shall not apply to any "trade or business carried on by a body corporate during any "chargeable accounting period if, for a year or period which "includes, or for years or periods which together include, the "whole of the chargeable accounting period, the actual income "of the body corporate from all sources is apportioned under or "for the purposes of section 21 of the Finance Act, 1922, and "all the persons to whom it is apportioned are individuals."

The reference to the Finance Act, 1922, is a reference to the provisions in that Act which made the individual corporators of certain kinds of company, in certain circumstances, liable in respect of super-tax for the income of the company as though it had been wholly distributed among the members.

Paragraph 7 of Schedule IV to the original Act was also amended by section 32 (1) of the Finance Act, 1947, so that its first sub-paragraph now was, so to speak, reversed in its emphasis. It reads (as amended): "Income received from "investments or other property shall be included in the profits "except"—and there are certain exceptions. So that henceforth all such income was included, save in so far as excepted. Paragraph 8 of the original schedule remained as it had originally been enacted. Finally, whereas the tax in respect of each business of a taxpayer carrying on more than one business had been (it will be recalled) separately computed by virtue of section 20 (1) of the Act of 1937, the Act of 1947 provided by section 43

(1): " All trades or businesses to which section 19 of the Finance " Act, 1937, applies carried on by the same person shall be " treated as one trade or business for the purposes of the enact- " ments relating to the profits tax ", and by section 47 (1): " Subject to the provisions of this section,"—which do not affect the present point—" the provisions of this Part of this Act relating " to the profits tax shall have effect with respect to all charge- " able accounting periods any part of which falls after the end of " the year 1946."

It follows from the two citations which I have just made that, in the case of a body corporate carrying on during the year 1947 and onwards more than one distinct business or trade, all those businesses or trades would be taken together for the purpose of computing profits tax. It will be observed that the formula in section 19 (1)—" profits arising . . . from any trade or business " —which was essential in the case of an individual, so as not to subject to the tax profits or income not so arising—was retained after the tax had become limited to the profits of bodies corporate and unincorporated bodies of persons. The formula which appears in section 31 (2) of the Act of 1947—" the actual income of the " body corporate from all sources "—was not made the basis of the tax in the case of bodies corporate. That point was considerably emphasized on the company's side during the course of the argument.

During the period before the primary vesting date—that is, January 1, 1947—the company carried on, in addition to its coalmining business, several other business activities of a distinct nature, for example, structural steel manufacturing, brickmaking and dairy farming—all businesses very different the one from the other, but all, in fact, businesses within the ambit of the tax.

The Special Commissioners held that the company was not liable for the tax claimed in the case. The basis of the commissioners' decision was that the company's various business activities constituted distinct and separate businesses, and, accordingly, that, since the coalmining business had altogether ceased on and by January 1, 1947, the sums in question, which were exclusively referable to the discontinued activity, did not arise from any trade or business carried on by the company during the relevant chargeable years.

Paragraph 13 of the case stated reads: " (3) But we found, on " the evidence adduced before us, that the company's composite " trade or business consisted at the material time of a number of " separate and severable trades, of which its colliery concern was "one, and that that trade ceased entirely on January 1, 1947. "(4) We further held that as a consequence of our finding of fact "as set out in sub-paragraph (3) above, the said payments under "the Coal Acts, 1946 and 1949, were not receipts of any trade "carried on by the company during the relevant chargeable "accounting periods, because it had ceased to carry on its colliery "trade on January 1, 1947. (5) We further held that, on a proper "construction of section 19 (2) and section 22 of the Coal Act, "1946; section 1 of the Coal Act, 1949, and paragraph 7 (1) of "Schedule IV, Finance Act, 1937, as amended by section 32 (1), "Finance Act, 1947, the said payments were not 'income "'received from investments or other property.'"

Roxburgh J. based his conclusion in favour of the Crown exclusively on the terms of the amended paragraph 7 (1) of Schedule IV to the Finance Act, 1937, holding that the sums in question were, on any view, income of property within the meaning of that paragraph. There was some argument before us whether the judge assumed that, if the sums were caught by paragraph 7 (1) of Schedule IV to the Finance Act, 1937, they would also and necessarily be profits arising from the company's trade or business on the basis that the company was formed as a trading company. I do not think myself that the judge made any such assumption. Argument on the application to the facts of the case of section 19 (1) of the Finance Act, 1937, was, so I understand, stopped by the judge as irrelevant, having regard to the view which he took of the application of paragraph 7 (1) of Schedule IV. The judge, therefore, thought, in my view, that whether or not the scope of section 19 (1) was thereby enlarged, the sums in question were, in any case, "income received from ". . . other property," namely, the principal sum of compensation or the stock representing that sum, or, perhaps, the chose in action, being the right to get that compensation.

He said [1]: "This compensation could not properly be regarded "as an investment, but I can see no reason at all why it is not "'other property.' . . . The company's right to that compensa"tion was, in my judgment, plainly a chose in action; nonetheless "a chose in action because it was the creature of statute . . . "true, it is a right conferred by statute, but from what is it to "be income? I should have thought plainly from the compensa"tion due, payment of which was still deferred. In other words, "these payments arose from the chose in action, consisting of

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[1] [1954] 1 W.L.R. 1199, 1203; [1954] 3 All E.R. 69, 73.

" compensation due but still unpaid, and fall directly within the " words 'income received from . . . other property,' and, " therefore, by virtue of paragraph 7, should be included in the " profits."

If the question on this appeal was whether the judge was right in the view I have attributed to him, I should, for my part, be inclined to disagree with him; the language of sections 19 and 22 of the Coal Act, 1946, seems to me carefully and deliberately to avoid the result that the interim income is income from or of the compensation provided for in section 19 (1); rather it is treated (and, as I think, deliberately treated) as a distinct right, quantified, no doubt, by reference to the amount of the section 19 (1) compensation, but nonetheless something in addition to, rather than flowing naturally from, the section 19 (1) compensation: a distinct compensation for the loss of earnings during the period between the primary vesting date and the payment of the section 19 (1) compensation. The revenue payments, moreover, were computed without reference to the section 19 compensation at all; they are in substitution for the interim income right and, under the Act of 1946, might be retained, even though they were in excess of the proper amount of the interim income.

I refer again to the language of the relevant sections. Section 19 (2) speaks, it will be remembered, of a " right to " interim income " to be satisfied in the manner set out in section 22. Section 22 (2) (*a*) provides that the right shall be satisfied by making, " in addition to " the issue of the stock, etc., a money payment of " an amount equal to " interest on it; and in (*b*) of the same subsection the relevant words are " additions to com- " pensation." Finally, it will be recalled that in subsection (4) of the same section there is repeated this somewhat special and elaborate language—" so far as regards additions thereunder for " the said two years or any part thereof to compensation for a " transfer of transferred interests "—and again later—" except " as to any excess of the aggregate amount of such additions.'

In the course of the argument reference was made to other statutes, and I will refer to one merely for the purpose of emphasizing the special character of the language used in the Coal Act, 1946, as distinct from the sort of language which is used in other contexts, when what is clearly intended is neither more nor less than income on a principal sum. I refer to section 32 (2) of the Transport Act, 1947, which provides: " Where the compensation " payable to any person in respect of a wagon is satisfied by the " issue of British transport stock interest on which begins to

" accrue as from a date later than the date of transfer, the Commission shall pay to him interest on the amount of the compensation, at such rates as the Treasury may determine. . . ."

I agree that, as Mr. Cross pointed out, all this income compensation is comprised within the terms of section 19 (2) of the Act of 1946, whether the form it took was that of revenue payments or otherwise; but I think that that fact is not enough, having regard to the language used, to make the interim income or the revenue payments in reality and substance income arising from, or income of, the section 19 (1) compensation or arising from the right to receive that compensation conferred by the statute. In my judgment that view is reinforced by the circumstance, having regard again to the special language used, that the compensation was stated to be due on the primary vesting date.

It is not, however, necessary for me to express a concluded view on this point for, just as in this court Mr. Russell, for the company, conceded that the sums in question were, in truth, income, so Mr. Cross in turn, on behalf of the Crown, conceded that the amended paragraph 7 (1) of Schedule IV to the Finance Act, 1937, could not enlarge the scope of the formula in section 19 of that Act; in other words that, if they are to be chargeable to profits tax, the sums in question must be " profits arising from " a trade or business."

Mr. Cross conceded that paragraphs 7 and 8 of Schedule IV, when read together, were, in their scope, of a limiting rather than an expanding character. The case of the Crown in this court, therefore, has been of a two-fold nature: (1) Since the company is a trading company formed for the exclusive purpose of carrying on business, therefore all receipts in the nature of income must inevitably be—or be brought into account in ascertaining—" profits " arising from the trade or business." Thus the last-mentioned formula becomes synonymous with " profits arising in the course " of trade "; or, simply, with trading profits. (2) Alternatively, if a company could, by appropriate separation, keep the income of the kind here in question wholly distinct from its other and ordinary trade receipts (for example, as or as part of a first stage in the repayment of capital to its shareholders), that was not done on the facts in this case.

Mr. Cross referred to the printed accounts for the years 1947 and following of the company. I will take one of these printed accounts as an illustration, namely, that for the year ended December 31, 1950. The profit and loss account for the company and its subsidiaries opens with an item of " profits (less losses) on "trading, including provisional revenue payments under the Coal "Industry (No. 2) Act"—and so on, so-much. The balance sheet of the Butterley Company itself is divided on the right-hand side under the headings "Assets previously owned which vested "in the National Coal Board" and "Assets not vested in the "National Coal Board." Under the first heading, which includes freehold and leasehold property less depreciation, there appears an item of deduction of proceeds of sale of Treasury bonds received on account of compensation; but under the second heading "Assets not vested in the National Coal Board" there appears, brought in as a current asset, compensation for certain vested assets, and in the profit and loss account there is brought in a provisional revenue payment receivable from the Ministry of Fuel and Power, which is clearly a reference to receipts under the Coal Nationalization Acts. Those instances show that, for the purpose of making up their accounts, revenue sums received from the Ministry were brought into the profit and loss account by the company, together with the rest of its income and so as to form part, for accounting purposes, of the whole of the company's income.

As regards the second or alternative point, Mr. Cross said that there was, in truth, a lacuna in the findings of the commissioners. For the question is as to the separate character of the company's enterprises after and not before January 1, 1947. Mr. Cross relied also on the terms of section 43 (1) of the Finance Act, 1947, which provides that, for the purposes of profits tax, all trades or businesses should be treated, as from the date mentioned—January 1, 1947—as one in the case of a company carrying on more than one trade or business.

As to this second or alternative point, I think that it is now too late for us to draw any inferences of fact from the accounts. The chairman of the company and the chief accountant gave evidence before the commissioners and they were not cross-examined on the point at all. I think we must conclude that the separateness of the various trades was as great after as before January 1, 1947, and that the commissioners' findings so intended to state; and such a matter is a question of fact for the determination of the commissioners: see, for example, the judgment of Rowlatt J. in *Scales* v. *George Thompson & Co. Ld.*[2]

Further, in regard to the point made on section 43 (1) of the Finance Act, 1947, the question is of the nature of the sums when received, not what was done with them after receipt. Section

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[2] (1927) 13 T.C. 83.

C. A.
1955

INLAND REVENUE COMMISSIONERS v. BUTTERLEY CO. LD.

Evershed M.R.

43 (1) treats all the trades of a particular company as one as from January 1, 1947, for the purposes of the profits tax; but, the coalmining business of the company having then ceased, the sums in question cannot, in my judgment thereby—that is, by a mere application of the terms of section 43 (1)—be made profits of a trade if, in truth, they were not.

Finally, since this was a compulsory acquisition by the State, there is no real room, in the absence of clear evidence, for any intention related to the time before the sums were received. It is not, in my view, in doubt that the profits of a trade for present purposes must be profits of a trade being carried on during the chargeable accounting period. I think, therefore, that Mr. Cross's second or alternative argument cannot be sustained on the facts as found and that it would not, in the circumstances, be right for us now to refer the matter back to the Special Commissioners.

The question, therefore, comes down to the single point and turns on the first head of the argument on the part of Mr. Cross, which I have stated above. On the whole, my conclusion is against the Crown upon this matter. The grounds for my conclusion I can state under four heads: (1) Even in the case of a trading company, the conception that not all income is business earnings appears to be accepted, for example, by the House of Lords in *Inland Revenue Commissioners* v. *Gas Lighting Improvement Co. Ld.*[3] and later *Inland Revenue Commissioners* v. *Tootal Broadhurst Lee Co. Ld.*[4] Those cases related, in fact (in the former case) to excess profits duty and (in the latter) to excess profits tax, and it is no doubt true that the question whether particular items or assets were investments turns on the special provisions of the rules applicable to that duty or tax. Nevertheless, it seems to me that the language which I am about to cite from their Lordships' speeches in the *Gas Lighting Improvement Co.* case [5] is of general application and relevant to the point which I have sought to make.

Thus, Lord Cave L.C. said [6]: " The expression "—that is, investments—" cannot be intended to apply to investments wholly " unconnected with the business to be assessed; for investments " of that character could in no case be regarded as capital of the " business, and it would be quite unnecessary to direct their exclu- " sion. It must therefore refer to investments connected with

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[3] [1923] A.C. 723; 12 T.C. 503.

[4] (1949) 29 T.C. 352; [1949] 1 All E.R. 261.

[5] 12 T.C. 503.

[6] Ibid. 535.

"the business, and I see no reason why it should not include an "investment of part of the business capital in an outside security, "though made with the object of forwarding the trading operations for which the business was constituted."

Lord Finlay said[7]: "The rule"—that is, rule 8 of the particular rules applicable to the duty—"must, on the face of it, "have been intended to deal with cases in which but for its provisions the income of these investments would have formed "part of the profits of the business. The rule is meaningless if "it was intended to apply only to income which formed no part "of the profits of the business, as such income would be already "outside the scope of the excess profits duty. I do not see how "it is possible to escape from the conclusion that rule 8 includes "within its operation cases in which the money, from which "the income was derived, was employed in the business of the "company assessed to excess profits duty."

Lord Atkinson agreed entirely with what Lord Finlay had said.

In the *Tootal Broadhurst* case[8] the question was whether certain patents ought to be regarded as an investment for the purposes of the tax, the patents being assets from which the company derived substantial revenue. I confine myself to one passage from the judgment of Lord Simonds in which (as will be observed) he referred to the *Gas Lighting Improvement Company* case.[9] He said[10]: "It appears to me that the problem may be "solved in this way. I would take a schedule of the assets of the "trading company concerned and, omitting assets such as stocks "and shares to which in view of the decision in the *Gas Lighting* "*Improvement Co.*[11] case the title of investments can in no circumstances be denied, would ask of each other asset: 'Is this "'an asset which the company has acquired and holds for the "'purpose of earning profits in, or otherwise for the promotion "'of, its particular trade or business?' There might be border-"line cases in which the answer would be uncertain, but I do not "doubt that in the vast majority of cases the answer would be "clear cut."

I should, however, refer also to the speech of Lord MacDermott in this case, since it was somewhat relied upon by Mr. Cross. Lord MacDermott said[12]: "'If, in the course of carrying on my "'business, I make active use of a business asset—be it my

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[7] 12 T.C. 503, 539.

[8] 29 T.C. 352, 372.

[9] 12 T.C. 503.

[10] 29 T.C. 352, 372.

[11] 12 T.C. 503.

[12] 29 T.C. 352, 376.

C. A.

1955

Inland Revenue Commissioners v. Butterley Co. Ld.

Evershed M.R.

" ' factory building, a piece of machinery, a patent or my working " ' capital—that asset is not an investment. Whatever else a " ' business investment may have to be, it is an asset for the " ' time being held intentionally aloof from the active work of " ' the business. It is none the less an asset of the business and " ' may have great business value: for instance, it may enable " ' me to survive bad times and take advantage of good, or it may " ' help me to control supplies or competition. And if it produces " ' income that is income of the business. But I do not earn that " ' income by my business efforts. The part I play there is " ' essentially passive.' "

I cannot, for my part, regard the language of Lord MacDermott as sufficient, having regard to what I have cited from the earlier case and from the speech of Lord Simonds, to dispose of the statement I have made that, in the case of a trading company, not all income arising from assets belonging to the company can be treated as business earnings or income arising from a trade or business.

(2) The formula, which was, as I have already stated, deliberately preserved after the amendment of the Finance Act, 1937, was "profits arising from a trade or business." When individuals were liable to the tax, this formula had an obvious and necessary significance: so as to exclude income or profits belonging to the individual and derived otherwise than from his business. It should not be said, in my judgment, that the amendment of 1947, which (among other things) excepted the individual from the tax, had the oblique effect of making the original formula necessarily synonymous with "income from all "sources."

(3) The commissioners found, as a fact, that the various business enterprises of the company were, immediately before January 1, 1947, separate and distinct. There is, in my view, no basis for saying either: (a) that after January 1, 1947, there was some kind of amalgamation, or (b) that the sums here in question, which were in fact derived from a discontinued separate business, became automatically the profits of one or all of the continuing and separate businesses. Section 43 (1) of the Finance Act, 1947, can only operate to the extent that the businesses in fact being carried on after January 1, 1947, are treated as one for the purposes of the computation of the tax.

(4) If the disposal of the coalmining business had been a voluntary act upon similar or somewhat similar terms, then I conceive that the income receipts might be treated as arising from

a trade or business, on the ground that the sale had been (and had been intended as) a business transaction; but here the transfer to the National Coal Board was provided by Parliament in invitum so far as the company was concerned, which could do no other than obey the law and receive the sums which Parliament ordained. Such a transaction must have been wholly outside the contemplation of the original corporators and the scope of the company's memorandum of association. No intention in regard to income for the future can, in my judgment—in the absence, at least, of direct evidence—be attributed to the company or its directors; to treat the income payments as arising from any trade or business being carried on by the company is, to my mind, wholly unreal and insensible.

Reference was made to the terms of section 1 (5) of the Coal Act, 1949, as showing that Parliament regarded the revenue payments—at least, under the Coal Act, 1949—as subject to profits tax. I cannot for my part attach any significance to this matter. Assuming that Parliament did so contemplate—and the subsection, to my mind, is by no means free from doubt in this respect—the Coal Act was not in pari materia with the Finance Acts. In these circumstances, and according to well-established principles, see, for instance, *Camille and Henry Dreyfus Foundation Inc.* v. *Inland Revenue Commissioners*,[13] the language of the subsection cannot influence the interpretation of the Finance Act, 1937, in its application to the facts of the present case.

On the other hand, if the question had been asked of the company, in any of the years 1947 and following: "what is your "business income?" or, more correctly: "what are the profits "arising from your business?" I think that a natural answer (contrary to the suggestion put before us by Sir Reginald Hills) would not have taken these income payments into account.

For the reasons which I have attempted to state, I would allow the appeal.

Jenkins L.J. This is an appeal by the Butterley Co. Ld. from a judgment of Roxburgh J. dated July 27, 1954, allowing an appeal by the Crown from a determination of the Special Commissioners in favour of the company on an appeal to them by the company against assessments to profits tax for the calendar years 1947 to 1950 inclusive.

Down to December 31, 1946, the company carried on a number of trades or businesses, including the trade or business of colliery proprietors. As from January 1, 1947, the company's colliery undertaking was compulsorily acquired by and vested in the National Coal Board under the provisions of the Coal Industry Nationalization Act, 1946, and the company became entitled to receive in respect of the assets so transferred an unascertained amount of compensation, and also to receive, for the period between January 1, 1947, and the date on which the compensation was fully satisfied, periodical payments designated in the Act as interim income and calculated as therein provided.

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[13] [1954] Ch. 672; [1954] 2 All E.R. 466.

The question in the case is whether the payments received by the company in respect of interim income under the compensation provisions of the Act of 1946 in each of the calendar years 1947 to 1950 are liable to profits tax.

In approaching this question it is material to observe that, according to the facts found by the Special Commissioners, it appears: first, that the colliery concern of the company constituted a trade separate from its other trades and ceased entirely on January 1, 1947, the date on which the colliery concern was compulsorily acquired by the National Coal Board; and, secondly, that thereafter the company continued to carry on its various other trades, which conversely were distinct and separate trades from the defunct colliery concern, and included iron founding, structural steel manufacturing, wagon building, wrought iron production, brick making, civil engineering and dairy farming.

The profits tax was first imposed under the name of the "national defence contribution" by the Finance Act, 1937. The more material provisions of that Act are these: by section 19 (1) the tax is "charged on the profits arising in each chargeable "accounting period . . . from any trade or business to which this "section applies." I here also refer to various other provisions of the Act of 1937 to which my Lord has already referred: I will not take up time by reading them again in extenso.

Then by the Finance Act, 1947, s. 31 (1) (*a*), it was provided that the charge of profits tax should not apply to any trade or business, unless it was carried on by a body corporate or unincorporated society or other body. By section 32 (1) the substitution was made in respect of paragraph (7) of Schedule IV to the Act of 1937, and to that again my Lord has sufficiently referred.

Section 43 (1) of the same Act provided that all trades or businesses to which section 19 of the Finance Act, 1937, applied, carried on by the same person should be treated as one trade or business for the purposes of the enactments relating to the profits tax. By section 47 (1) of the same Act it was provided, so far as material for the present purpose, that these changes in the law relating to profits tax should have effect with respect to all chargeable accounting periods any part of which fell after the end of the year 1946.

It is unnecessary to refer at any great length to the complicated provisions of the Coal Industry Nationalization Act, 1946. So far as material for the present purpose this Act provided by section 5 for the vesting in the National Coal Board of the assets to be transferred to it. With exceptions not here material, such vesting was by section 5 (1) to take place automatically on such date as the Minister might by order appoint, therein referred to as the primary vesting date and in fact fixed by the Minister as January 1, 1947. By section 10 (1) compensation was to be made as thereinafter provided in respect of the transfer to the board of the transferred interests. The provisions as to compensation were elaborate, involving as they did the fixing of a global sum representing the total amount of compensation payable in respect of all the assets acquired throughout the country, the apportionment of this sum amongst valuation districts, the allocation of the various transferred interests to compensation units, the valuation of those units, and the rateable apportionment amongst the units in each valuation district according to their respective values of the compensation allocated to such district. It was therefore likely to be a matter of years before the compensation payable in respect of any individual colliery concern could be fully ascertained and satisfied. By section 21 (1) the compensation in respect of a transfer of transferred interests was, with immaterial exceptions, to be satisfied by the issue of Government stock, and this stock was by section 23 subject to certain restrictions as to the disposal thereof. The provisions chiefly material for the present purpose are those contained in sections 19 and 22 of the Act.

It will be seen that under section 22 the right to interim income conferred by section 19 was, as regards the years 1947 and 1948, to be satisfied (in effect) by whichever of the following sums might be the greater, that is to say, the additions provided for by subsection (1) to instalments of compensation satisfied, and the "revenue payments" provided for by subsection (3), with no provision for the repayment of any excess of the latter over the former. By the Coal Industry (No. 2) Act, 1949, provision was made for the continuance in a modified form of "revenue "payments" in respect of the year 1949 and subsequent years,

C. A.
1955

INLAND REVENUE COMMISSIONERS v. BUTTERLEY CO. LD.

Jenkins L.J.

until the compensation payable in respect of the transferred assets of any concern was fully satisfied. I here refer to the provisions of the Act of 1949 which my Lord has already read.

The contentions advanced on behalf of the company before the Special Commissioners were to this effect: first, that the "interim "income" payments received by the company under the Acts of 1946 and 1949, whether in the form of additions to instalments of compensation under section 22 (2) of the Act of 1946, or in the form of revenue payments under section 22 (3), or in the form provided for under section 1 of the Act of 1949, notwithstanding the statutory description of "interim income" assigned to them in section 19 (2) of the Act of 1946 and elsewhere, were not income of the company, but part of the compensation payable to the company for the taking away of its colliery assets; secondly, that these "interim income" payments were not profits of the trades or businesses carried on by the company during the relevant chargeable accounting periods, but arose to the company from its colliery concern, which trade ceased entirely on January 1, 1947, and, thirdly, that such payments were not "income received from investments or other property" within the meaning of paragraph 7 (1) of Schedule IV to the Finance Act, 1937, as amended by section 32 of the Finance Act, 1947. For the Crown, on the other hand, it was contended: first, that such payments were income of the company; secondly, that such payments were part of the profits of the trade or business carried on by the company in the relevant chargeable accounting periods; and, thirdly, that such payments were income received from investments or other property within the meaning of paragraph 7 (1) of Schedule IV to the Finance Act, 1937, as amended.

The Special Commissioners first stated their conclusion that the payments in question were not properly included in computing, for the purposes of the profits tax, the profits of the company for the relevant chargeable accounting periods; secondly, held, that such payments were income of the company and rejected the company's first contention; and continued the statement of their findings which my Lord has already read.

Roxburgh J. found it unnecessary to decide whether the payments received by the company in respect of "interim income" were or were not profits arising from the trades or businesses carried on by the company during the relevant chargeable accounting periods, for in his view, whether this was so or not, it was at all events plain that these payments were "income "received from property," and as such fell to be included in the profits of the company for the purposes of profits tax, by virtue of the express direction in paragraph 7 (1) of Schedule IV to the Act of 1937, as amended, that, with exceptions not applicable in the present case, "income received from . . . property shall "be included in the profits." This provision, in his view, had the effect of bringing the interim income payments into the charge to profits tax, whether they were, or were not, profits arising from any trade or business carried on by the company in the relevant chargeable accounting periods. Accordingly, he allowed the Crown's appeal.

In this court, Mr. Russell, for the company, abandoned the contention that the interim income payments were not income at all, while Mr. Cross, for the Crown, abandoned the contention that the claim to tax could be established merely by showing that the interim income payments were income received from property.

It thus became common ground that the interim income payments, whether they were or were not income received from property, were only chargeable to profits tax if they were profits of a trade or business carried on by the company during the relevant chargeable accounting periods. This must, I think, be the right view. The charging section, that is to say section 19 of the Act of 1937, charges the tax on the profits arising in each chargeable accounting period from any trade or business to which the section applies, and charges nothing other than the profits so arising. Paragraph 7 of Schedule IV to the Act of 1937, as originally framed, in providing that income from investments or other property should, with the exceptions therein mentioned, be excluded from the profits, must be taken to have been referring to investments or other property, the income received from which would, apart from its exclusion, have been included in the profits arising from the trade or business, and not to income from investments or other property which have nothing to do with the trade or business, the exclusion of which would have been wholly unnecessary. Compare *Commissioners of Inland Revenue* v. *Gas Lighting Improvement Co.*,[14] *per* Lord Sterndale M.R., Lord Cave L.C., Lord Finlay, and *Commissioners of Inland Revenue* v. *Tootal Broadhurst Lee Co. Ld.*,[15] *per* Lord MacDermott. Similarly, I think that the substituted paragraph 7 (1) of Schedule IV to the Act of 1937 introduced by section 32 of the Act of 1947, in providing that income received from investments

[14] 12 T.C. 503, 525, 535, 539.

[15] 29 T.C. 352, 376.

C. A.
1955

Inland Revenue Commissioners v. Butterley Co. Ld.

Jenkins L.J.

or other property should, with the exceptions therein mentioned, be included in the profits, must be taken as referring to income received from investments or other property, the income from which forms part of the profits arising from the trade or business. In other words, I think that the inclusion of income received from investments or other property enacted by the new paragraph 7 (1) of Schedule IV to the Act of 1937 relates to investments or other property of the same character as those to which the exclusion enacted by paragraph 7 of that schedule in its original form related. I cannot construe the new paragraph 7 (1) as bringing into charge to tax investments or other property which having nothing to do with the trade or business. I think this view is reinforced by the circumstance that, until the amendment in this respect introduced by section 32 of the Act of 1947, the charge to tax extended to trades or businesses carried on by partnerships or individuals. The question to be answered being whether profits of a trade or business received in the form of income from investments or other property were to be included in the charge to tax, the old paragraph 7 gave the answer "No, "with certain exceptions," and the new paragraph 7 (1) gave the answer "Yes, with certain exceptions." Before the amendment the general rule was that income received from investments or other property, which would otherwise have been included, should be excluded, whereas after the amendment the general rule was that there should be no such exclusion.

Accordingly, the argument before us was, in effect, directed to two questions, that is to say: first, whether the interim income payments, considered simply as periodical payments in the nature of income received by the company under the provisions of the Coal Industry Nationalization Act, 1946, and the Coal Industry (No. 2) Act, 1949, were profits arising from any trade or business carried on by the company in the relevant chargeable accounting periods; and, secondly, alternatively, whether such interim income payments, considered, if they could properly be so considered, as income received from property, in the shape either of a capital sum represented by the compensation when ascertained or of an income bearing asset consisting of the right to receive interim income under the Acts, were profits arising from any such trade or business.

The first of these questions must, I think, clearly be answered in the negative. The commissioners found, as a fact, that the colliery concern of the company constituted a trade separate from its other trades and that that trade ceased entirely on January 1,

1947. The separate nature of the colliery concern and its cesser are both undoubtedly questions of fact, as to which the Special Commissioners' findings are binding upon us. The cesser of the company's colliery concern was indeed a matter upon which a finding was hardly required, as it followed as a necessary consequence of the application of the provisions of the Act of 1946 to that concern, and, to be strictly accurate, the exact moment of cesser would appear to have been midnight on December 31, 1946–January 1, 1947. On these findings, the interim income payments clearly could not be profits arising from the carrying on of the company's colliery trade, which had wholly ceased. It is equally clear that such payments were not in fact profits arising from any of the trades or businesses which the company continued to carry on after the cesser of its colliery trade. Such payments were received independently of, and had nothing to do with, any of those other trades or businesses. They would have been received just the same if the company had never carried on any trade or business other than its colliery concern. In view of the Special Commissioners' finding as to the separate character of the colliery concern, the interim income payments cannot be imputed to the trades or businesses which were continued by the company, on the ground that the colliery concern was merely a branch or department of one entire business, which was continued as a whole with the substitution of the company's rights under the Acts of 1946 and 1949 for the defunct colliery concern. I do not think that section 43 (1) of the Finance Act, 1947, as to treating all trades or businesses carried on by the same person as one for profits tax purposes can assist the Crown here, for the separate colliery trade in this case ceased contemporaneously with the beginning of the first chargeable accounting period to which that section applied. The true nature, as I see it, of the interim income payments is that they were not profits arising from any trade or business but were payments in the nature of income made under the Acts of 1946 and 1949 to compensate the company for the loss of income which it sustained during the period from January 1, 1947, to the date of final ascertainment and satisfaction of the compensation by reason of the compulsory acquisition and consequent cesser of its colliery trade.

As to the second question, I do not think that the case for the Crown is improved by treating the interim income payments as income received from property, whether in the shape of a capital sum represented by the compensation when ascertained or of an income bearing asset consisting of the right to receive interim income under the Acts, for it is, as I have said, common ground that income received from property in order to be chargeable with profits tax must be profits arising from a trade or business carried on during the relevant chargeable accounting period. I think that income received from property can only answer that description if the property from which it is received can fairly and properly be described as an asset of the trade or business so carried on. In view of the separate character possessed by the company's colliery concern down to the date of its compulsory acquisition and consequent cesser, it seems to me impossible to hold that the company's rights under the Acts, whether to the capital compensation when ascertained or to the interim income payments, can fairly or properly be described as constituting assets or income of the trades or businesses carried on by the company during the relevant chargeable accounting periods, that is to say, its trades or businesses other than the separate and defunct colliery concern. These rights and their produce were just as separate and distinct from the continued trades or businesses as the colliery concern had been while it existed.

Mr. Cross sought to meet this difficulty in two ways: first, he said that the company had, in fact, dealt with the interim income payments and treated them in their accounts as if they were income of the continued trades or businesses, and had, in like manner, treated the payments on account of compensation as assets of the continued trades or businesses. Thus, whatever the position might have been if the company had segregated the interim income payments and the payments on account of compensation from the continued trades or businesses, the company had, in fact, chosen to make them income and capital assets respectively of the continued trades or businesses, with the result that the interim income payments became part of the profits arising from the continued trades or businesses for the purposes of profits tax. Secondly, he said that the raison d'être of a trading company being to trade, any income received by such a company must be income of its trade or business. The latter point can, I think, be shortly disposed of. Profits tax is charged on the profits arising from any trade or business carried on during any given chargeable accounting period, and not on the income from all sources of the person carrying on any trade or business during any given chargeable accounting period. It follows that income received by a trading company is not chargeable to profits tax, merely on the ground that it is income of a trading company. It must be shown further that such income represents profits arising from some trade or business carried on by that company during the relevant chargeable accounting period.

As to the former point, Mr. Russell did not dispute that the interim income payments and payments on account of compensation were, in fact, treated by the company, as and when received, as if they were respectively income and capital assets of the continued trades or businesses. This, indeed, appears clearly enough from the post-1946 balance sheets and accounts of the company annexed to the case. The interim income payments, as and when received, were credited to revenue account, while the payments on account of compensation, as and when received, were, broadly speaking, applied in writing down to the nominal figure of £1 the book values of the assets taken over by the Coal Board and discharging the company's overdraft, the surplus over such book values being in part carried to reserve and in part applied by way of distribution of capital profits. But, said Mr. Russell, the quality of a given income receipt as being or not being profits of a trade or business carried on by the recipient must be judged and determined at the time of receipt, and, if it is not profits arising from such a trade or business when received, it cannot be converted into profits so arising by reason of the fact that it is afterwards treated as if it had been profits so arising. Moreover, while it is no doubt true that, so far as the payments on account of compensation were, as and when received, made part of the capital assets of the continued trades or businesses, any income thereafter derived from them would fall to be brought into the computation of the profits arising from those trades or businesses for profits tax purposes, it does not follow that, pending the actual ascertainment and receipt of the compensation for the time being outstanding, the mere right to receive it, when ascertained, became an asset of the continued trades or businesses, so that the interim income, considered as income of the compensation, became, as income of property which was an asset of those trades or businesses, part of the profits arising from them in the shape of "income received from . . . property" within the meaning of paragraph 7 (1) of Schedule IV to the Act of 1937 as amended. That conclusion would be inconsistent with the Special Commissioners' finding that the company's colliery concern was a separate trade. The right to receive the outstanding and unascertained compensation was a right conferred exclusively in respect of the compulsory acquisition and consequent cesser of that separate trade and had nothing to do with the company's other trades or businesses. The fact that the stock or cash received in or towards satisfaction of the right was, as and when received, appropriated to the purposes of the continued trades or businesses could not alter retrospectively the character of the right, any more than the appropriation to such purposes of the interim income payments, as and when received, could alter retrospectively the character of those receipts.

As appears from the above discussion of the arguments, the two questions into which I divided the matter in issue earlier in this judgment to some extent overlap, and perhaps they would be better described as two ways of approaching the same question. On both questions, or on both methods of approach, I think that the argument for the company should prevail.

If the view I have formed to the effect that the interim income payments in this case are not, upon the true construction of the relevant provisions of the Finance Acts, 1937 and 1947, chargeable to profits tax, is right, I find it impossible to hold that the references to profits tax in the proviso to section 1 (5) of the Coal Industry (No. 2) Act, 1949, has made them so chargeable. Those references at most imply an assumption by Parliament that interim income payments under the Act of 1946 and that Act were subject to profits tax; but an assumption made in a later enactment as to the construction and effect of a given statutory provision is not to be treated as if it were an amendment of the earlier provision. Such legislative assumptions may sometimes be used for the purpose of resolving doubts or ambiguities, but do not alter the law. See the cases on this subject collected in *Camille and Henry Dreyfus Foundation Inc.* v. *Inland Revenue Commissioners*,[16] and particularly the succinct observation of Lord Radcliffe in *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ld.*[17] that " The beliefs or assump- " tions of those who frame Acts of Parliament cannot make the " law."

Moreover, it is to be observed that, in the present case, the Act in which the assumption as to liability for profits tax is made is not directly concerned with profits tax, but with the continuation, in an amended form, of the provisions of the Coal Industry Nationalization Act, 1946, as to interim income. The incidental references to profits tax in the provisions as to the adjustment of payments may thus well have been made merely ex abundanti cautela with little or no consideration of the question whether

[16] [1954] Ch. 672.

[17] [1952] A.C. 401, 426; 33 T.C. 259, 287; [1952] 1 T.L.R. 560.

the interim income payments were or were not liable to the tax. Finally non constat that there may not conceivably have been cases in which the facts and circumstances were such as to attract profits tax on the interim income payments, and the possibility that such cases might exist would suffice to satisfy the references to the tax in the Act of 1949 without recourse to the supposition that the legislature regarded it as exigible in all cases.

The admission made by the Crown to the effect that the new paragraph 7 (1) of Schedule IV to the Finance Act, 1937, as amended by the Finance Act, 1947, only includes "income "received from . . . property" where such income forms part of the profits of the trade or business, and the view I have formed to the effect that the interim income payments in the present case, even if considered in other respects as "income "received from . . . property" within the meaning of the paragraph, were not profits of any trade or business carried on by the company during the relevant chargeable accounting periods, make it unnecessary for me to decide whether these income payments were, in other respects, "income received from . . . "property" within the meaning of the paragraph. This seems to me at least open to doubt. The Act of 1946 studiously avoids describing the interim income as interest on or income of the compensation, even when the interim income is to be satisfied in the way provided by section 22 (2) (*a*), the formula there used being "the said right" (that is to say, the said right to interim income) . . . "shall be satisfied . . . by making, in addition to "the issue of the stock then issued in satisfaction of that amount "of compensation . . . a money payment of an amount equal to "interest for that period on that amount of compensation at such "rate or rates as may be prescribed . . ."; and these additional payments are referred to elsewhere in the Act as "additions" to the compensation. Under the provisions of section 22 (3) as to revenue payments (which, in effect, were to be made for the calendar years 1947 and 1948 in lieu of the above-mentioned "additions" in all cases in which they would be larger than such additions), these payments were to be calculated by reference to the past earnings of the concern, and bore no relation at all to the amount of the compensation. In continuing the revenue payments in modified form the Act of 1949, in effect, made them as regards 1949 and subsequent years subject to adjustment by repayment to the Minister of any amount whereby they were found to exceed the interim income which would have been payable for the same period according to the method of calculation provided for by section 22 (2) (*a*) of the Act of 1946, but, subject to such adjustment, the right given is still a right measured by reference to past earnings. I find it difficult to hold that the interim income payable under these Acts, defined and measured in the way it is, can properly be described as income of the compensation; and there is, I think, much to be said for the view that, albeit itself in the nature of income, it is not income of the compensation but rather "income-compensation," if I may use that expression, that is to say, a series of periodical payments, an independent right to which is conferred by the Act by way of compensation for the loss of income sustained in respect of the period between the primary vesting date and the ascertainment and satisfaction of the capital compensation.

Mr. Cross's suggestion that, at all events, the interim income was income of an income bearing asset in the shape of the right to receive it conferred by the Acts strikes me as highly artificial. My doubts are, I think, warranted by some observations of Lord Simonds and Lord MacDermott in *Inland Revenue Commissioners* v. *Tootal Broadhurst Lee Co. Ld.*[18] on the meaning of the word "investments." Lord Simonds said: "The problem, "my Lords, is a different one, not whether these assets, being "investments, are within the paragraph, but whether they are "investments at all, and, as I have already said, that is a word "whose scope will depend on its context. It appears to me that "the problem may be solved in this way. I would take a "schedule of the assets of the trading company concerned and, "omitting assets such as stocks and shares to which in view of "the decision in the *Gas Lighting Improvement Co.* case [19] the "title of investments can in no circumstances be denied, would "ask of each other asset: 'Is this an asset which the company "'has acquired and holds for the purpose of earning profits in, "'or otherwise for the promotion of, its particular trade or "'business?' There might be borderline cases in which the "answer would be uncertain, but I do not doubt that in the vast "majority of cases the answer would be clear cut."

Then, later, his Lordship said: "Applying this test to the "facts of the present appeal I cannot believe that any business "man (who may be regarded as the touchstone in such a case) "would describe the patent rights here in question as "investments of the appellants or the payments received by

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[18] 29 T.C. 352, 372.

[19] 12 T.C. 503.

"them under the licences or agreement as income of their "investments."

Lord MacDermott said [20]: "My Lords, I do not think any "business man would describe the income so obtained as 'income "'received from investments.'" Then: "It is plain, therefore, "that 'investments' refers to some assets and not to others. "The statute, however, does not lay down any method of segre-"gation for its purposes and, in the absence of such provision, "the proper test must, in my opinion, be related to the limited "sphere of trade or business with which the Act is here dealing "and founded, accordingly, upon the meaning of the word for "the man engaged in trade or business rather than for the man "in the street."

It is true that, as Lord MacDermott pointed out, the words to be considered were "income received from investments" without the addition of the words "or other property," which are of wider import. But, if it is right to consult the probable views of the business man as to the meaning of "investments," I see no reason why the same test should not be applied in considering the meaning of the word "property." I therefore ask myself whether any business man would describe the interim income receivable under the Acts of 1946 and 1949 as "income "received from . . . property," and find it difficult to believe that he would.

It is, however, unnecessary to pursue this question further, and for the reasons I have earlier stated I would allow this appeal.

Morris L.J. In considering the facts in this case it is necessary to have in mind the precise provisions pursuant to which profits tax is charged. The wording of section 19 (1) of the Finance Act, 1937, provides that: "There shall be charged, "on the profits arising in each chargeable accounting period . . . "from any trade or business to which this section applies a tax." The wording of subsection (2), so far as relevant for present purposes, provides that the section applies to all trades or businesses of any description carried on in the United Kingdom. Section 20 (1) of the Act provides that "the profits arising from "a trade or business in each chargeable accounting period shall be "separately computed, and shall be so computed on income tax "principles as adapted in accordance with the provisions of the "Fourth Schedule to this Act." There is the further provision

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[20] 29 T.C. 352, 376, 377.

C. A.
1955

INLAND REVENUE COMMISSIONERS v. BUTTERLEY CO. LD.

Morris L.J.

that: "For the purpose of this subsection, the expression "'income tax principles' in relation to a trade or business means "the principles on which the profits arising from the trade or "business are computed for the purpose of income tax under "Case I of Schedule D, or would be so computed if income tax "were chargeable under that Case in respect of the profits so "arising."

It is to be noted that the function of Schedule IV is to set out certain adaptations of income tax provisions as to the "computation" of profits for the purpose of the tax.

It was not before us contended on behalf of the Crown, nor in my judgment could it validly have been contended, that any of the provisions contained in Schedule IV could enlarge or do enlarge the words contained in the body of the Act by which a charge is imposed. The result is therefore that the tax is charged upon the actual profits arising in a chargeable accounting period from a trade or business which is being carried on and which is not exempt. In computing those profits the provisions of the Fourth Schedule come into play: but they do not come into play so as to extend the scope of the tax. Thus paragraph 7 of Schedule IV, both in its original form and in the substituted form introduced by section 32 of the Finance Act, 1947, refers to "income "received from investments or other property." The reference is to investments or other property of the trade or business. When by the Finance Act, 1937, the tax (then called the national defence contribution) was imposed, it then applied not only to bodies corporate but also to individuals who owned a trade or business. In either case, the reference in the schedule to "investments or other property" was to such investments or other property as related to or formed part of the trade or business as opposed, particularly in the case of individuals, to those which were unrelated to the trade or business.

The Butterley Company carried on a number of trades. They included coalmining, iron founding, structural steel manufacturing, waggon building, wrought iron production, brick making, civil engineering and dairy farming. There is a finding of fact that the colliery concern of the company constituted a trade separate from its other trades: there is a further finding that that trade "ceased entirely" on January 1, 1947.

The position was, therefore, that the Butterley Company before January 1, 1947, carried on the trade or business of coalmining (which I will call business A) and various other businesses (which I will call businesses B, C, D and E although, in fact, they were more than four in number). The commissioners found that what they called the company's "composite trade or "business" consisted at the end of the year 1946 of "a number "of separate and severable trades" of which the colliery concern was one. Business A ceased entirely on January 1, 1947. The company then had businesses B, C, D and E, and the company owned the statutory rights to income and capital given by the Coal Industry Nationalization Act of 1946. When "interim "income" payable pursuant to the provisions of that Act was received, the company could use or apply that income in such way as it decided. But the question now arising is as to the nature and quality of that income at the time of its receipt. This cannot be affected or altered by the manner in which it was used, applied or spent after receipt. Though the "interim "income" must be regarded as "income" when received by the company, the present inquiry is whether it was income arising from a trade or business carried on by the company in a chargeable accounting period. Business A was no longer being carried on and so profits tax could not be charged in reference to it. Businesses B, C, D and E must as a result of section 43 of the Finance Act, 1947, "be treated as one trade or business." But the "interim income" had no relation to businesses B, C, D and E, whether treated as one or whether regarded separately and singly. I do not think that the Crown can successfully assert that these businesses ceased to be separate after the end of 1946. The stated case refers to the "trades" carried on after January 1, 1947. The "interim income" did not in any way or in any sense arise from the "trade or business" which I may call "B plus C plus D plus E." In my judgment it would be contrary to the realities of the situation so to hold. It is true that the company, which owned the business of "B plus "C plus D plus E," also owned the rights resulting from the Coal Act, 1946, after business A, which belonged to the company, had been compulsorily acquired. But the mere ownership of the statutory rights resulting from the acquisition of business A did not, on the finding in this case, amount to a business in itself (and it is to be observed that no suggestion has been made that the provisions of section 19 (4) of the Finance Act, 1937, have application in this case) or to a new business to be tacked on to businesses B, C, D and E and to be treated as one with them. The company might have placed all its receipts of "interim "income" to a suspense account. In fact, as the accounts of the company show, the money, when received, was employed in

C. A.
1955

Inland Revenue Commissioners v. Butterley Co. Ld.

Morris L.J.

the general operations of the company. As a result, it might be that in later years some income, which would result from the use of the "interim income," would be included in the income or profits attracting profits tax. But the manner in which the company employed the "interim income," which they received, is, in my judgment, not relevant in an inquiry as to whether it arose from a trade or business being carried on in a chargeable accounting period. As it did not so arise, profits tax did not, in my judgment, become chargeable upon it. I would allow the appeal.

Appeal allowed.
Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue; Thicknesse & Hull.*

B. A. B.

1955
Mar. 8, 9, 28.

Vaisey J.

In re DEFIANT CYCLE CO. LD.

[No. 00565 of 1953.]

Company—Winding up—Costs—Costs in proceedings before winding up—Not in Companies Court—Jurisdiction to order taxation in Companies Winding-Up Department or Central Office of Supreme Court.

The Companies Court has jurisdiction in the compulsory winding up of a company to direct a taxation and an account to be carried out either in the Central Office of the Supreme Court or in the Companies Winding-Up Department against a solicitor (who has no claim against the company and no money in his hands admittedly that of the company) who was concerned in certain litigation on behalf of the company and in other litigation allegedly on its behalf before the winding-up order. Such taxation should in normal circumstances take place in the Central Office of the Supreme Court, but there might be cases where it would be more advantageous for it to take place in the Companies Winding-Up Department.

Summons.

This summons was argued in chambers but adjourned into open court for judgment. The question arose for decision whether the Companies Court had jurisdiction in the compulsory winding up of a company to direct a taxation either in the Central Office of the Supreme Court or in the Companies Winding-Up Department against a solicitor (having no claim against the company and no money admitted to be that of the company in his hands) who was concerned before the winding up in a successful appeal on behalf of the company from a conviction by Tottenham justices in proceedings instituted by the Ministry of Supply. The facts are set out in the judgment.

Kenneth Mackinnon for the liquidator of the company.
Maurice Berkeley for the solicitor.

Cases cited in argument not referred to in the judgment: *In re Foss, Bilborough, Plaskitt & Foss* [1]; *In re Brabant.*[2]

Cur. adv. vult.

Mar. 28. VAISEY J., reading his judgment: This company was ordered to be wound up by the court on July 27, 1953, on the petition of a creditor. The value of the assets is said to be not more than £169, while the gross liabilities are said to amount to some £13,554, which sum includes £805 due to a preferential creditor. The Official Receiver, as liquidator of the company, has learnt that a short time before the winding up the company had successfully appealed against a conviction by the Tottenham magistrates in certain proceedings instituted against the company by the Ministry of Supply, and he was informed by a letter dated July 31, 1953, that Mr. Lucien Fior, practising as Messrs. Fior, had acted as solicitor for the company in those proceedings, and that the question of the party and party costs of the successful appeal remained outstanding. The liquidator wrote to Mr. Fior on August 10, 1953, asking him to refund any balance in his hands after taxation of his costs.

The present summons was issued in the Companies Court on November 11, 1954; it is entitled in the matter of the company, the Defiant Cycle Co. Ld., in the matter of the Companies Act, 1948, and in the matter of the Solicitors Act, 1932. It asks that Mr. Fior be ordered to deliver a bill of costs, and a cash account, and it asks that such costs be taxed.

It would appear from the records of the company that moneys to the total of £600 had been paid to Mr. Fior either on account of costs or otherwise, and it would further appear that those moneys were paid solely on account of the conviction and appeal above mentioned. I will refer to these proceedings as the "police "court proceedings." Mr. Fior has never rendered any bill of

[1] [1912] 2 Ch. 161.

[2] (1879) 23 S.J. 779.

costs to the company or the liquidator in connexion with the police court proceedings, and by a letter dated June 2, 1954, Mr. Fior stated that the sum of £103 14s. 6d. had been recovered in respect of the party and party costs allowed in connexion with the appeal. Mr. Fior has never accounted for any of these moneys. In his letter of January 4, 1954, Mr. Fior had claimed to be entitled to set off against the company's moneys held by him or his firm certain costs in connexion with an action entitled *Nicolene Ld.* v. *Simmonds.*[1] Simmonds, the defendant to that action, was one of the directors of the company, but the company was not a party to the action. That case concerned a contract for the sale and purchase of 3,000 tons of steel reinforcing bars. It seems unlikely that this company, with a paid-up capital of only £100, and whose principal or only activity appears to have been the manufacture of children's toys, should have had anything to do with the *Nicolene*[1] action. However, it seems to be suggested either that it was concerned in that action, or that the £600 received from its coffers by Mr. Fior (£450 by cheques and £150 in cash) was applied for its benefit in some manner (quite unexplained) in connexion with the *Nicolene*[2] action. The evidence on the matter is practically non-existent. There is no record of the company, such as a minute, authorizing the use of the company's money to finance either party in the said action. I do not know when or how Mr. Fior was retained to act for the company, or in respect of what matters he was so retained. The liquidator asks that Mr. Fior should be ordered to render a proper bill and provide a proper cash account relating to the matters referred to above or any other matters, and that the bill should be taxed, and that Mr. Fior should repay to the company any balance of the moneys remaining in his hands.

Mr. Fior has deposed that he first commenced to act for the company in 1951, and that he acted on behalf of Simmonds the defendant in the *Nicolene*[2] action in connexion with the proceedings brought against him by Nicolene. He says that he did this on the company's instructions, but there seems to be no record as to why and how and when and by whom those instructions were given. The action was brought for damages for breach of a contract in respect of which the defendant was deemed to be personally liable, but whether and, if so, to what extent he was acting on behalf of the company and has any right to indemnity from the company seems to be wholly unknown.

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[1] [1953] 1 Q.B. 543; [1953] 1 All E.R. 822.

[2] [1953] 1 Q.B. 543.

As regards the police court proceedings, Mr. Fior deposes that at the end of May, 1952, he was instructed to act on behalf of the company and its two directors, namely Simmonds and one MacNay, in respect of 43 summonses issued at Tottenham Police Court on the instructions of the Ministry of Supply. There were also three other summonses issued against the company and MacNay in respect of other matters connected therewith. In October, 1952, the police court proceedings were disposed of. Some of them were dismissed. The matter is somewhat confused, but it seems to me indisputable that Mr. Fior has had £600 of the company's money for which he is bound to account to the liquidator subject only to his right to retain what is owed to him for costs in respect of the police court proceedings. As regards the *Nicolene* [2] action, it seems to me that this was an action against Simmonds alone, and that the company is not concerned with it at all. Of the £600 above referred to £450 was paid to Mr. Fior by cheques drawn on the company's banking account. In the absence of evidence which, so far as I can see, is non-existent, I should assume that these moneys were moneys of the company placed in the hands of Mr. Fior and held by him to the company's order. The remaining £150 was paid in cash drawn from the company's banking account either by Simmonds or MacNay, and I cannot tell what the actual source of that money was, nor for what purpose it was paid, except that Mr. Fior alleges (as I understand) that it was paid on account of the costs not only of the police court proceedings but of the *Nicolene* [2] action.

The summons is, as I have said, entitled in the matter of the Solicitors Act, and I think that I have full jurisdiction sitting in the Companies Court to make the order asked for in the terms in which I propose to make it: see *Storer & Co.* v. *Johnson*,[3] and *In re Park*.[4] This court is unquestionably a branch, department, or division of the High Court, and the only uncertain question is the purely procedural one of whether the taxation should take place in the Companies Winding-Up Department or in the Central Office of the Supreme Court, that is, as an ordinary taxation. On this point the authorities (*Storer & Co.* v. *Johnson*,[5] *In re Park*,[6] and *In re Palace Restaurants Ld.*[7]) afford no clear guidance, and the textbooks such as Palmer (16th ed., Part II, p. 311), Stiebel (3rd ed., p. 1097), the Annual Practice (1955, p. 1109), Buckley (12th ed., pp. 515 and 539), Gore-Browne (41st ed., pp. 679 and 743) and Cordery (4th ed., p. 391) are not, and could not be expected to be, any more helpful than the authorities. The registrars attached to the Companies Court are well used to taxing bills of costs, and are " taxing officers " within the meaning of the Rules of the Supreme Court, Ord. 71, r. 1. My own view is that I have jurisdiction to direct the taxation in such a case as the present to be carried out either in the Companies Winding-Up Department or by a taxing master of the Supreme Court, at my discretion. I can imagine cases in which the choice should fall on the first alternative. Here, I think that the reference should be to the taxing department of the Central Office of the Supreme Court, and this is probably the course which ought generally and in normal circumstances to be followed. I therefore order as follows: First, that Mr. Lucien Fior, practising as Messrs. Fior, as solicitor to the company within 21 days from the date of this order deliver to the Official Receiver as liquidator of the company or to his solicitors his bill of costs as such solicitor in connexion with certain proceedings instituted against the company by the Minister of Supply. Secondly, that Mr. Lucien Fior do also within the said period deliver to the said Official Receiver as such liquidator a cash account of all moneys received from the company whether on account of the said proceedings or on any other account. Thirdly, that it be referred to a taxing master of the Supreme Court to tax the said costs. The liquidator will have to consider very carefully the question how far the costs included in the bill are properly the costs of the company or costs for which the company is responsible, and not merely costs of Simmonds or MacNay. On the evidence as it stands, it seems to me to be just as likely that Simmonds and MacNay were liable to indemnify the company in respect of costs as that the company was liable to indemnify them: and the order which I am now making should be a first step to illuminating an obscure situation.

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[2] [1953] 1 Q.B. 543.

[3] (1890) 15 App.Cas. 203.

[4] (1889) 41 Ch.D. 326.

[5] 15 App.Cas. 203.

[6] 41 Ch.D. 326.

[7] [1914] 1 Ch. 492; 30 T.L.R. 248.

I propose to order Mr. Fior to pay the Official Receiver's costs of the present summons.

Order accordingly.

Solicitors: *Stafford Clark & Co.; Lucien Fior.*

I. G. R. M.

In re COATES, DECD. RAMSDEN *v.* COATES.

1954
Dec. 2, 3.

Roxburgh J.

[1954 No. 2567.]

Power of Appointment — Unascertainable class — Executors to divide limited sum among "friends" nominated by testator's widow— Validity of power—Question of uncertainty.
Will—Construction—Uncertainty—Condition precedent.

A testator by his will, after making provision for his wife and bequeathing a number of pecuniary legacies, directed: "If my wife "feels that I have forgotten any friend I direct my executors to "pay to such friend or friends as are nominated by my wife a "sum not exceeding £25 per friend with a maximum aggregate "payment of £250 So that such friends may buy a small memento "of our friendship. I have forgotten A and B and C but my "wife will put that right."

On the question whether this provision was valid or void for uncertainty:—

Held, (1) that the power of selection conferred on the wife being collateral and not coupled with a duty, it was not essential to its validity that the whole class of beneficiaries could be ascertained a priori; (2) that having regard to the language and context of the will the wife, or the court with the assistance of her evidence, would have no difficulty in determining whether any propositus was or was not a proper object of the power, so that the power did not fail for uncertainty.

In re Gestetner Settlement [1953] Ch. 672; [1953] 1 All E.R. 1150 applied.

Gower v. *Mainwaring* (1750) 2 Ves.Sen. 87 and *In re Caplin's Will* (1865) 2 Drew. & Sm. 527 distinguished.

ADJOURNED SUMMONS.

Frederick Pearson Coates, who died in 1953, by his will made on June 6 of that year made provision for his wife and for a number of pecuniary legacies. By clause 8: "If my wife feels "that I have forgotten any friend I direct my executors to pay "to such friend or friends as are nominated by my wife a sum "not exceeding £25 per friend with a maximum aggregate payment of £250 So that such friends may buy a small memento "of our friendship." By a marginal note, which was admitted to probate, the testator added: "I have forgotten Richard Hurton "and C. G. Chapple Mark Francis and Miss Jennings but my "wife will put that right."

A summons was taken out to ascertain, inter alia, whether the provisions of clause 8 were void for uncertainty.

1954

COATES, DECD., *In re.* RAMSDEN *v.* COATES.

R. Gwyn Rees for the executors.

G. H. Newsom for the widow. There seems to be no English authority on the present question, but in two old cases, *Gower* v. *Mainwaring* [1] and *In re Caplin's Will*,[2] the expression "friends "and relations" was construed to mean "relations."

This is a special power of appointment and is not coupled with a duty; there is no direct authority against it. The limit of the gift to £250 shows that the class is a small one. In *In re Gape*,[3] which was concerned with a condition subsequent, where the test is stricter, the Court of Appeal held that it was not essential for the validity of such a condition that the question whether a forfeiture had or had not been incurred could be ascertained not only with certainty but with perfect ease. In *In re Keighley* [4] a power of appointment in favour of "my people" was held to be good.

In this case it is not necessary to define the limits of the class a priori; it is sufficient if it can be seen that any individual satisfies the test.

J. A. Brightman for beneficiaries interested in income of residue. The gift is void, as being a special power of appointment among a limited class so ill-defined that the court cannot determine whether any particular person is qualified or not. The word "friend" is incapable of legal definition, as is shown by *Gower* v. *Mainwaring*.[5] It would be going quite against the current of authority to hold that the expression "friends" is sufficiently precise. *In re Keighley* [6] merely shows that "people" is a precise class as therein defined, that is, persons related by blood or marriage. That is a much clearer limitation than "friend," which has merely an emotional meaning.

R. S. Lazarus for beneficiaries interested in corpus of residue. If this gift is to be good there must be some degree of conceptual certainty, though there does not appear to be any authority which applies to a case such as this the degree of conceptual certainty required in conditions subsequent.

Friendship is a question of degree, and there is no indication in the will as to the quantum of friendship necessary to qualify. The court could not determine whether any individual was within the class unless it could define with certainty the meaning of

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[1] (1750) 2 Ves.Sen. 87.

[2] (1865) 2 Drew. & Sm. 527.

[3] [1952] Ch. 743; [1952] 2 T.L.R. 477; sub nom. *In re Gape's Will Trusts* [1952] 2 All E.R. 579.

[4] [1919] 2 Ch. 388; 35 T.L.R. 491.

[5] 2 Ves.Sen. 87.

[6] [1919] 2 Ch. 388.

"friend." The degree of intimacy is not defined; that distinguishes this case from *In re Gestetner Settlement.*[7]

ROXBURGH J., after stating the facts: First, I decline to be intimidated by threats as to where this decision may lead. I am not deciding whether or not a power to appoint in favour of a testator's friends without qualification would be valid. I do not intend to express any view on that point, because I regard it as immaterial for the purposes of the present case. This enables me to discard two ancient cases, the conclusions in which certainly appear to have defeated the intentions of the testator whether or not they are otherwise sound. I refer to *Gower* v. *Mainwaring*,[1] where the trust was "to give the residue of A's "estate 'among his friends and relations where they should see "'most necessity, and as they should think most just'", and was construed as a trust in favour of relations simpliciter. There is a similar, and I think perhaps more difficult decision in *In re Caplin's Will*,[2] where "A testator bequeathed a fund to his wife "for life, and after her death to be paid to such and so many "of the relations or friends of the wife as she should by will "appoint," and it was held that "relations or friends" must be construed "relations." As I have said, I feel able to by-pass those decisions because the words with which I am concerned are quite different. This is not a case of a condition subsequent, and I find no necessity to introduce into this subject the difficult doctrine of conceptions having an a priori certainty.

I accept to the full as my guide the judgment of Harman J. in *In re Gestetner Settlement.*[3] In the first place, I accept the distinction which he so clearly draws between a power coupled with a duty and a power collateral. There is, of course, no doubt that the present is a power collateral and the distinction, in my view, is of particular importance in this case; because if the power had been one which the trustees had to exercise, that is to say, had been a power coupled with a duty, and if it had been the law that if the trustees declined to exercise the power the court would have to exercise it for them either by saying that equality was equity or by some other refinement of doctrine, then I should have had no hesitation in holding that this power was bad because it would be quite impossible to draw up a complete list of every person who might come within the description contained in this clause, and I think that it would be necessary to be able to do so if this were a power coupled with a duty. But the fact is that this is a power collateral, and, if the wife had died before the testator, nobody could have exercised this power. I think that that is a circumstance of some importance in considering whether there is sufficient certainty here.

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[7] [1953] Ch. 672; [1953] 1 All E.R. 1150.

[1] (1750) 2 Ves.Sen. 87.

[2] (1865) 2 Drew. & Sm. 527.

[3] [1953] Ch. 672; [1953] 1 All E.R. 1150.

The very point that arose in *In re Gestetner Settlement*[4] and was decided by Harman J. arises here, though I do not mean that his decision covers the present case—it does not. But the point common to both cases is neatly stated in these words[5]: "It was said on behalf of the Crown and said also by Mr. "Jennings (as he was bound to do, representing infants interested "in default of appointment) that the power of selection given to "these trustees, being a power coupled with a duty"—that was a contention which Harman J. rejected—"is bad because it is, "as it admittedly is, impossible to know the limits of the area "of selection; that is to say, though the trustees can at any "moment tell whether John Doe or Richard Roe is a person "within the power, they cannot tell how many more people there "may be within it; and it was said that a power of this sort, if "it be not limited to known objects, is bad because the trustee "cannot perform his duty of considering the merits and demerits "of the objects unless he knows who they are." I think that that is the precise point which arises here. If this were a power coupled with a duty, it would be bad because in proceeding to exercise the selection the wife could not possibly know who fell within the exact limits of the class, that is to say, how many more people there might be within the class in addition to those whom she wished to select. But Harman J. has plainly decided—and again I accept that to the full—that in the case of a power collateral that requirement is not necessary.

But it is said that in the present case the donee of the power could not at any moment tell whether John Doe or Richard Roe was a person within the power. Of course, that was admitted in *In re Gestetner Settlement*,[6] and that is why it does not cover the present case. This question of uncertainty is a vexed question. Of course, language draws a series of mental pictures in the mind of the person hearing the words spoken. Those pictures are sometimes fairly well defined, and sometimes blurred in outline, but they are never very precise. Language is a medium which disdains mathematical rules. I, for my part, accept as my guide the words of Lord Tomlin in *In re Ogden*[7] cited by Harman J. in *In re Gestetner Settlement.* Lord Tomlin said[8]: "The question is one of degree in each case, "whether, having regard to the language of the will, and the "circumstances of the case, there is such uncertainty as to justify "the court coming to the conclusion that the gift is bad." That appears to me to be all that can possibly be said on the subject of uncertainty.

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[4] [1953] Ch. 672.

[5] Ibid. 684.

[6] [1953] Ch. 672.

What I have to consider is whether there is such a degree of uncertainty about the word "friends" in the context in which I find it, and in the circumstances of the case, as would justify me in coming to the conclusion that the gift was bad. Friendship, of course, draws a picture particularly blurred in outline, but its context, and the circumstances of the case—and a circumstance that I have particular regard to is the power of appointment vested in the testator's widow—may well fill in what would otherwise be vague. In my judgment, it is quite plain that this gift contemplates a degree of intimacy sufficiently close to make its detection quite easy. It is to be observed that the opening words (which may not have any imperative force but which, none the less, are not to be ignored in construing the gift) are: "If "my wife feels that I have forgotten any friend." Therefore, it must be somebody who is realized by the wife to be a friend at the moment of the testator's death. That is emphasized by the fact that in the margin he, as it were, picks up his own words: "I have forgotten"—I am sure that the emphasis is on the word "have"—"Richard Hurton and C. G. Chapple Mark "Francis and Miss Jennings but my wife will put that right," giving again to her a plain clue as to the sort of friends he had in mind. Then he directs that the wife may nominate such friends. It is to be noted that it is not any friends—it is the friends that his wife feels that he has forgotten. What she may nominate to them is not a fortune, but a sum not exceeding £25 per friend. That in itself indicates that the purpose here is sentimental, not financial. Again, to show that his purpose is sentimental, he provides that there shall be "a maximum aggregate payment "of £250." That is the limit of the widow's power of appointment. Then, to close any possible gap, he says "so that such "friends may buy a small memento of our friendship." Quite obviously that indicates to my mind that the testator was thinking of friends whom he would wish to remember him and who he thinks would wish him to remember them. In those circumstances it appears to me that it is only friends of a considerable degree of intimacy who are to be included in this gift.

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[7] [1933] Ch. 678; 49 T.L.R. 341.

[8] [1933] Ch. 678, 682.

I admit at once that if I were dealing with such problems as arose in *Sifton* v. *Sifton*[9] or *Clayton* v. *Ramsden*,[10] or other cases of defeasance, what I have said would be fatal because I could not a priori define the limit of the degree of intimacy required. I have often wondered whether it is ever possible to do that in connexion with any set of words. At any rate it is quite plain, in my view, from the judgment of Harman J. that it is not necessary for me to define such a limit a priori in this case.

All I have to say is that the widow must be able to tell at any moment whether John Doe or Richard Roe is a person within the power, and that if she applied to the court to know whether John Doe or Richard Roe was a person within the power, the court, on reading the evidence, would be able to say whether the person was or was not within the power. I cannot conceive that the court would have any difficulty in this case in answering such a question if the trustees, in excess of caution, thought it necessary to come to the court and ask the court to determine it.

It has to be borne in mind that the widow has to exercise the power and if she is already dead it cannot be exercised by anybody at all. Therefore, ex hypothesi, she is in a position to put before the court her precise reasons for saying that a recipient of the bounty is within the will, and she is the one person who would have paramount knowledge of the situation. What must her evidence be and to what extent must it go? First, she would have to swear that she felt that the testator had forgotten that particular friend. She would have to swear that first because otherwise the power would not arise. She would then have to explain why she thought that such a friend ought to have a memento, and why she thought that that friend would like to have a memento. I should think that on that evidence the court would have no possible doubt whatever as to whether the person was within the category or not. Accordingly, in my judgment, this power is valid, and can be exercised by the testator's widow.

Declaration accordingly.

Solicitors: *Church, Adams, Tatham & Co., for Day & Yewdall, Leeds; Theodore Goddard & Co.*

F. R. D.

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[9] [1938] A.C. 656; 54 T.L.R. 969; [1938] 3 All E.R. 435.

[10] [1943] A.C. 320; 59 T.L.R. 75; [1943] 1 All E.R. 16.

1955
March 2.

Danckwerts J.

In re GROTRIAN.
COX *v.* GROTRIAN AND OTHERS.

[1954 G. 2978.]

Will—Construction—War condition—Devise of property on condition that "peace be declared"—Whether condition satisfied.
International Law—War—Termination.

A testator, by clause 7 of his will, dated September 25, 1939, devised and bequeathed certain freehold and leasehold properties to his trustees upon trust for his son absolutely "if he shall be living "at the date of my death and if the present war with Germany "shall have been terminated and peace have been declared. . . ."

Clause 8 of the will provided: ". . . if my said son . . . shall "survive me and subsequently the present war with Germany shall "terminate and peace be declared my said son shall thereupon "become absolutely entitled to my said properties. . . ."

The testator died on November 10, 1939; the son survived his father, and died on June 17, 1954.

By a declaration dated July 9, 1951, and published as a supplement to the London Gazette of July 6, 1951, it was declared "that "the formal state of war with Germany is terminated as from "four o'clock p.m. today, July 9, 1951." On a summons to determine the destination of the property referred to in clauses 7 and 8 of the will:—

Held, that by virtue of the declaration of July 9, 1951, the state of war subsisting between the United Kingdom and Germany had been terminated and peace had been declared within the meaning of clause 8 of the will, and that, accordingly, the personal representatives of the son's estate were entitled to have transferred to them the property in question.

Observations of Lord Macnaghten in *Janson* v. *Driefontein Consolidated Mines Ld.* [1902] A.C. 484, 497; 18 T.L.R. 796 applied.

Kotzias v. *Tyser* [1920] 2 K.B. 69; 36 T.L.R. 194 and *Lloyd* v. *Bowring* (1920) 36 T.L.R. 397 distinguished.

ADJOURNED SUMMONS.

The testator, Frederick Grotrian, who died on November 10, 1939, by clause 7 of his will dated September 25, 1939, devised and bequeathed his "properties in the county of Yorkshire known "as Bingley Moor and Burley and Hawkesworth Moors and all "other if any of my freehold or leasehold property in the county "of Yorkshire unto my trustees upon trust for my . . . son "Frederick Stephen Brent Grotrian absolutely if he shall be living "at the date of my death and if the present war with Germany "shall have been terminated and peace have been declared but "if my said son shall predecease me or if such peace shall not "have been declared at the date of my death my trustees shall "hold the said property upon the following trusts:—(a) to sell "and convert the same into money and invest the proceeds in "their names; (b) to pay the income of such investments to my "said son Frederick Stephen Brent Grotrian during his life; "(c) after his death to pay to such son's wife if she shall survive "him during the remainder of her life and so long as she shall "not have remarried the sum of £300 per annum out of such "income; (d) subject to the foregoing trusts to hold the said "investments upon trust in equal shares for such of the children "of my said son Frederick Stephen Brent Grotrian as shall attain "the age of 25 years and if more than one in equal shares."

By clause 8: "I declare that if my said son Frederick Stephen "Brent Grotrian shall survive me and subsequently the present "war with Germany shall terminate and peace be declared my "said son shall thereupon become absolutely entitled to my said "properties in Yorkshire or to the proceeds of any part thereof "which may in the meantime have been sold or the investments "representing such proceeds and my trustees shall thereupon "transfer to my said son such property, proceeds and investments accordingly."

By clause 10 the testator devised and bequeathed the residue and remainder of his estate of every kind unto his trustees upon trust for sale and conversion, and the usual administrative trust, and directed his trustees to hold the residue ("residuary estate") "as to one-half part thereof upon the same trust as are hereinbefore declared concerning my property in Yorkshire and as to "the other half-part thereof upon trust for my . . . daughter "absolutely."

The testator's son, Frederick Stephen Brent Grotrian, survived the testator, and died on June 17, 1954. On July 9, 1951, a Declaration was published in a supplement to the London Gazette of July 6, 1951, in the following terms:

"*Privy Council Office*, *July* 9, 1951. *It is notified that the* "*formal state of war with Germany is terminated as from four* "*o'clock p.m. today*, *July* 9, 1951.

"On the instructions of His Majesty's Principal Secretary of "State for Foreign Affairs the United Kingdom High Commissioner in Germany addressed, on July 9, 1951, a communication "to the Federal Government of Germany in the following terms: "'His Majesty's Government in the United Kingdom, bearing in "'mind that on September 3, 1939, a state of war was notified

1955

GROTRIAN, *In re.* COX *v.* GROTRIAN.

" ' with the German Reich, that active hostilities were ended by " ' the declaration regarding the surrender of the German Reich " ' issued on June 5, 1945, but nevertheless the formal state of " ' war with Germany has continued to subsist so far as the municipal law of the United Kingdom is concerned, and will so " ' continue until the appropriate action is taken by His Majesty's " ' Government to terminate it, that through circumstances " ' beyond German control it has as yet proved impossible to " ' conclude a treaty which would dispose of questions arising out " ' of the state of war with the German Reich, have determined " ' that, without prejudice to the Occupation Statute, or to the " ' decision of the questions the settlement of which must await " ' the conclusion of a treaty, the formal state of war between " ' the United Kingdom and Germany shall be immediately " ' terminated. A notification is, therefore, being published that " ' the formal state of war with Germany has terminated as from " ' four o'clock p.m. on July 9, 1951. . . .' "

The plaintiffs, the trustees of the testator's will, took out the present summons for the determination of the question whether on the true construction of the will of the testator and in the events which had happened the investments now representing the property devised and bequeathed by clause 7 of the will and one-half of the testator's residuary estate were now held by the plaintiffs upon the trusts declared by sub-clauses (*c*) and (*d*) of clause 7; or (2) ought to be transferred to the personal representatives of the testator's son, Frederick Stephen Brent Grotrian.

G. T. Hesketh for the plaintiff trustees.

S. G. Maurice for the son's widow. The answer to the summons should be in accordance with the terms of sub-clauses (*c*) and (*d*) of clause 7 of the will. Clause 8, on the face of it, offends the rule against perpetuities, for at the date when the will was made it could not be predicated how long the war would last and there was a possibility that it might continue for a longer period than lives in being and for 21 years from the death of the survivor.

If it be held that clause 8 does not offend the rule, it becomes material to consider whether or not peace has been declared within the meaning of the clause. It is submitted that all the conditions laid down in the clause have not been satisfied. It may be that the war has been terminated, but peace has not been declared. The situation in this respect is different today from that which obtained after the 1914–18 war. The Declaration of July 9, 1951,

1955

GROTRIAN,
In re.
COX
v.
GROTRIAN.

simply declared that the state of war subsisting between the United Kingdom and Germany had been terminated. This was a matter of commercial convenience to assist the resumption of normal trading between the two countries. It does not follow that because peace may have been made that it has thereby been *declared*. The declaration of peace follows the ratification of a peace treaty: see the Order in Council made under the Termination of the Present War (Definition) Act, 1918, which selected the date January 10, 1920, for the declaration of peace following the 1914–18 war. There has been no comparable legislation in respect of the 1939–45 war.

In *Kotzias* v. *Tyser*[1] it was held that peace had not been concluded between Great Britain and Germany on or before June 30, 1919, within the meaning of an insurance policy. In *Lloyd* v. *Bowring*,[2] which followed the decision in *Kotzias* v. *Tyser*,[1] it was held that for the purpose of a contract to pay a sum of money "if peace is not declared" by a certain date between two nations at war, peace is not declared until the ratification of the treaty of peace. Reliance is placed on those decisions for the submission that peace has not been declared within the meaning of clauses 7 and 8 of the will.

J. A. Wolfe, for the son's children in the same interest, adopted the argument for the son's widow. In *Janson* v. *Driefontein Consolidated Mines Ld.*[3] Lord Macnaghten said that "the "law recognizes a state of peace and a state of war, but that it "knows nothing of an intermediate state which is neither the one "thing nor the other—neither peace nor war." Although such an intermediate stage was not known in 1902, and possibly not in 1920, it is known at the present time. Until the present day the practice of States was that war was concluded on the ratification of a peace treaty. It is plain from the terms of the Declaration of July 9, 1951, that it is intended that a peace treaty shall be concluded between the United Kingdom and Germany at some future date. Further, the Bonn Convention of May 26, 1952, shows that a peace settlement is envisaged for the whole of Germany and not merely in respect of that part of the country under the domain of the Federal Republic.

Since 1945 there has arisen a state of affairs in which there has been no war and yet peace has not been declared, and a declaration of peace is still awaited. The observations of Lord

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[1] [1920] 2 K.B. 69; 36 T.L.R. 194.

[2] (1920) 36 T.L.R. 397.

[3] [1902] A.C. 484, 497; 18 T.L.R. 796.

Macnaghten in *Janson* v. *Driefontein Consolidated Mines Ld.*[4] do not represent the true position of the law on this topic today. There is at present a kind of twilight period between war and peace, and the Declaration of July 9, 1951, does not amount to a declaration of peace.

R. Cozens-Hardy Horne for the son's personal representatives. The events postulated by the testator in clause 8 of the will have come to pass and, accordingly, the son's estate is entitled to the property in question. The Declaration of July 9, 1951, not only terminated the war but also brought about a state of peace. This submission is fortified by the observations of Roche J. in *Kotzias* v. *Tyser*,[5] where he said: " It is to be observed that the " Act speaks of the date of the termination of the war, and that " the policy of insurance deals with the date of the conclusion of " peace, but both must be treated as referring to the same event " and therefore to the same date." Reliance is also placed on the observations of Lord Macnaghten in *Janson* v. *Driefontein Consolidated Mines Ld.*[6] It follows, therefore, that as the Declaration of July 9, 1951, terminated the war it also by necessary implication declared a state of peace to arise again between the United Kingdom and Germany.

It is submitted that on its true construction clause 8 does not offend the rule against perpetuities; it was only to apply if the event in question arose in the son's lifetime; accordingly, the event, namely, the declaration of peace, is an event which is limited to the duration of a lifetime in being. [Reference was also made to *Lloyd* v. *Bowring*.[7]]

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DANCKWERTS J. The testator made his will on September 25, 1939, that is, after hostilities had broken out between this country and Germany. The testator died on November 10, 1939. It is material to note (in order to see how the question which I have to decide arises) that the testator's son died on June 17, 1954.

[His Lordship read the relevant portions of the will and the Declaration in the London Gazette and continued:] Lord Macnaghten, in the well-known case of *Janson* v. *Driefontein Consolidated Mines Ld.*,[1] said: " I think the learned counsel for the " respondent was right in saying that the law recognizes a state " of peace and a state of war, but that it knows nothing of an " intermediate state which is neither the one thing nor the other

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[4] [1902] A.C. 484, 497.

[5] [1920] 2 K.B. 69, 78.

[6] [1902] A.C. 484, 497.

[7] 36 T.L.R. 397.

[1] [1902] A.C. 484, 497.

1955

GROTRIAN,
In re.
COX
v.
GROTRIAN.

Danckwerts J.

"—neither peace nor war." He added: "In every community it "must be for the supreme power, whatever it is, to determine the "policy of the community in regard to peace and war." If that statement by Lord Macnaghten applies to the present case, it seems to me plain that the Declaration or Proclamation of July 9, 1951, not only terminated the state of war between the United Kingdom and Germany, but it also brought about coincidentally a state of peace between the two countries. It is argued, however, on behalf of those who oppose the claim of the personal representatives of the son, that, in the somewhat different circumstances which have prevailed since the breaking out in September, 1939, of the second world war, the statements by Lord Macnaghten are no longer applicable to the present situation.

Reference has been made to cases decided as a result of the end of the war of 1914 to 1918; *Kotzias* v. *Tyser* [2] and *Lloyd* v. *Bowring*,[3] in aid of the arguments on behalf of both parties. Those decisions, however, seem to me to have nothing whatever to do with the problem which I have to decide today; both those decisions depended upon a situation which was essentially different from that which arises in the present case, and in particular it is to be noted that in 1918 a statute was passed specifically for the purpose of providing for the point, which was called the Termination of the Present War (Definition) Act, 1918, and which enabled His Majesty to declare by an Order in Council what was the exact date when the war was taken to have been determined. By the Order in Council of February 9, 1920, the date of the termination of the war and the substitution of peace was determined by not only the making of a peace treaty between the United Kingdom and Germany, but by the ratification of that treaty in a particular manner, and the date selected for that purpose was January 10, 1920.

After the cessation of hostilities on May 9, 1945, between the United Kingdom and Germany on the occasion of the last war the matter was not dealt with in the same manner. It might have been dealt with in a similar manner, but it was not; and it does not seem to me to follow that thereby the situation could not be determined in some other manner than by a statute as in 1918. It seems to me as plain as can be that the Order in Council or the Declaration of July 9, 1951, not only determined the state of war between the two countries but also brought about a state of peace.

[2] [1920] 2 K.B. 69.

[3] (1920) 36 T.L.R. 397.

It seems to me, therefore, that according to the terms of clause 8 of the will the condition therein mentioned was satisfied, because the present war with Germany thereupon terminated, and peace was declared. It is true that the Declaration did not in terms refer to peace, but in my view it is still true to say, in a situation of this kind, that the termination of war and the declaration of peace are coincident events, and that the declaration, therefore, which declared the determination of the war, by inference, necessarily declared a state of peace to arise again between the two countries concerned.

There is, however, another point which has been taken against the personal representatives of the son, and that is that the provisions of clause 8 of the will offend against the rule against perpetuities, because the termination of the war might be regarded as such an uncertain event when this clause was put in the will, at any rate by pessimists, that the war might continue for a longer period than lives in being and for 21 years from the death of the survivor. The pessimistic view is one which must be regarded as a possible view. If, therefore, that is the effect of the clause, it would seem that the event to take place before the son's interest came into being might result in his interest being avoided by the rule against perpetuities. It seems, on the face of it, rather a hard and somewhat unnatural situation. But, fortunately, I think that there is a construction which can fairly be put upon the clause which prevents that point having any application. The clause concludes, after reference to the event which is to decide the matter, that the son shall thereupon become entitled to the testator's properties in Yorkshire or to the proceeds of any part thereof which may in the meantime have been sold or the investments representing such proceeds, and that the testator's trustees are thereupon to transfer to his said son such properties, proceeds and investments accordingly. It is plain to me from that provision that the testator did not contemplate the event of the proceeds or property being transferred to the executors or administrators of the son's estate, and I think that it is a fair inference that the testator contemplated that the clause was only to apply upon the occasion of the event in question happening during the son's lifetime. That being so, of course, it was an event which was limited to the duration of a lifetime in being and no trouble arises by virtue of the rule against perpetuities. The event, as I have already held, happened in 1951, and the son did not die until 1954.

Accordingly, in my judgment, the conditions of the clause were satisfied, and the testator's son during his lifetime became absolutely entitled to the property referred to in the summons.

Declaration accordingly.

Solicitors: *Blyth, Dutton, Wright & Bennett, for Rawlins, Davy & Wells, Bournemouth; Rawlinson & Son; Nicholl, Manisty & Co.*

J. A. G.

1955
Jan. 20, 21, 24, 25, 26, 27, 28;
Feb. 1, 24;
Mar. 4, 7, 8.

Harman J.

WELCH *v.* BANK OF ENGLAND AND OTHERS.

[1954 W. No. 1531.]

Banking—Stock—Transfer—Bank of England stock—Transfers forged by trustee—Claim for restoration to register by surviving trustee—Estoppel—Negligence—Ratification—Limitation of action—Bank of England public authority—Transfers a nullity—Third party proceedings by bank against jobbers and stockbrokers who presented transfers—Claim for indemnity—Costs—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 2, 21—*Finance Act,* 1942 (5 *&* 6 *Geo.* 6, *c.* 21), *s.* 47—*Government Stock Regulations,* 1943 (*S.R. & O.* 1943, *No.* 1), *reg.* 2.

Limitation of Action. Costs—Third party proceedings. Company—Shares—Transfer.

A trustee (M.) between 1947 and 1951 converted to his own use £10,002 4 per cent. Consolidated Stock by forging the signature of his co-trustee (the plaintiff) on seven transfers.

In the first transaction, M. forged the name of the plaintiff, his co-trustee, on the cheque which he received on account of the stock sold by him and paid it into his own bank; that bank knew the plaintiff's signature and queried the transaction with her. The plaintiff accepted the false explanation of M. that the money was needed for the payment of death duties.

In transactions (3), (4) and (6) the proceeds of the sales passed into the joint income account of the trust, and were withdrawn by M. because the plaintiff had given him blank cheques signed by herself to enable him to draw income for the administration of the trust.

In transactions (2), (5) and (7) the proceeds went straight into the banking account of M. by means of authorities on which he had forged the plaintiff's signature.

The plaintiff claimed that the bank should restore her name to the register as the holder of the stock, and that she should be recouped the dividends accrued due on the stock since her name was removed; the bank, by a letter dated April 5, 1954, refused to comply with her request. The writ in the action was issued on April 30, 1954:—

Held, (1) that an action against the bank would lie at the suit of the plaintiff without joining the transferees.

Davis v. *Bank of England* (1824) 2 Bing. 393; *Sloman* v. *Bank of England* (1845) 14 Sim. 475 and *Barton* v. *London and North Western Railway Co.* (1888) 38 Ch.D. 144; 4 T.L.R. 420 applied; *Brewer* v. *Westminster Bank Ld.* [1952] 2 T.L.R. 568; [1952] 2 All E.R. 650 not followed.

(2) That no negligence on the part of the plaintiff could avail the bank unless it amounted to conduct estopping the plaintiff, or alternatively to a ratification of the defaults of her co-trustee; moreover, the loss must be a direct result of the negligence.

Bank of Ireland v. *Evans' Charities Trustees* (1855) 5 H.L.C. 389 and *Young* v. *Grote* (1827) 4 Bing. 253 applied.

(3) That it was not negligence on the part of the plaintiff to allow M. to have possession of the stock certificates.

Cottam v. *Eastern Counties Railway Co.* (1860) 1 J. & H. 243 applied.

(4) That, whether or not the plaintiff received notices of the transfers from the bank, the receipt by her of such notices afforded no defence to the bank.

Barton v. *London and North Western Railway Co.* (1889) 24 Q.B.D. 77; 6 T.L.R. 70 applied.

(5) That in the first transaction the plaintiff's conduct amounted to an authorization and ratification; and in transactions (3), (4) and (6) the plaintiff must be deemed to have had control of the money before it passed into the account of M., so that she could not succeed in respect of these transactions the proximate cause of which was her own negligence.

(6) That in transactions (2), (5) and (7) the negligence of the plaintiff was not directly connected with the loss, nor did her conduct amount to an estoppel or ratification, so that she was entitled to succeed.

(7) That the keeping of the register of Consols was a public duty enjoined on the bank, so that the removal from the register of the plaintiff's name and the refusal to reinstate it were acts done in pursuance of a public duty and the bank was entitled to rely on section 21 of the Limitation Act, 1939.

Dictum in *Sloman* v. *Bank of England* (1845) 14 Sim. 475 applied.

(8) That time under the statute did not run until the refusal of the bank to restore the plaintiff's name to the register, which was notified on April 5, 1954; but that as forged transfers were nullities time under the statute could not run in any event.

Barton v. *North Staffordshire Railway Co.* (1888) 38 Ch.D. 458; 4 T.L.R. 403; *Davis* v. *Bank of England* (1824) 2 Bing. 393 applied.

In re Severn and Wye and Severn Bridge Railway Co. [1896] 1 Ch. 559; 12 T.L.R. 262 distinguished.

ACTION.

The plaintiff, Mrs. Elise Marie Welch, asked for an order on the Bank of England to restore her name to the register as holder of £10,002 4 per cent. Consolidated Stock.

The following facts were now not in dispute: In 1890 one James Johnston, on the occasion of his marriage to Rebecca Maude, settled certain real estate, including in particular his residence, Kinlough House, in County Leitrim, to uses under which his wife received a rentcharge and a jointure with remainder, in the events which happened, to the settlor. He died on May 16, 1929, survived by his widow Rebecca. By his will his widow and three other persons became trustees. Under this last instrument the real property formerly included in the settlement and also a large group of investments stood limited to the widow for life with remainder to her son for his life with a remainder over which had not yet come into effect, the son being still alive. He was weak in his intellect and resided after his father's death with his mother at Kinlough House. She invited a cousin, one Hubert William Maude, to reside there and help to look after the place and her son.

Two of the trustees died in 1935 and the widow retired from the trusts, and by an instrument of June 2, 1935, appointed the Rev. Thomas Hutchinson Martin, her sister, the plaintiff in this action, and Hubert William Maude, to be new trustees.

The main holding among the investments at this time was the sum of £10,002 4 per cent. Consols, the subject of this action, and this investment with the others was duly registered in the names of the then trustees, namely, Christopher Hugh Maude, an original trustee under the will, and the three new trustees.

The widow died in August, 1935, leaving her son as tenant for life in possession. By a family arrangement Hubert William Maude remained in charge at Kinlough House. Christopher Hugh Maude died in November, 1942, and in May, 1943, the surviving trustees appointed one William Kemmis, a retired army officer living in County Tipperary, to be a new trustee. In September, 1943, the trust solicitors, acting on Maude's instructions, sent to the defendant bank a request to have the names of the three appointed trustees, namely, Martin, the plaintiff and Maude, entered on the register, and the name of Christopher Hugh Maude removed, but no request was made to add the name of Kemmis, the new trustee. This document bore the true signature of the plaintiff and gave her address as Bridgnorth in

Shropshire, which was her permanent home, though she was at the time by reason of the war living at Kinlough House.

Martin died in 1945, and in February, 1946, a request was sent to the defendant bank for the removal of his name from the register, but still none was made to add the name of Kemmis. This document also was signed by the plaintiff, but her address was now given as Kinlough House, though she had in fact by this time ceased to reside there. As a result a stock certificate in the names of the plaintiff and Maude, described as both of Kinlough House in County Leitrim, was issued on March 13, 1946, and came into Maude's hands. The same document showed that dividends were to be sent to a joint account at the Provincial Bank of Ireland at Bundoran. This was the trust income account and stood in the names of the plaintiff and Maude alone; almost the entire income was paid out to Maude, probably to maintain the tenant for life and the Kinlough property.

In those circumstances Maude embarked upon a course of fraud by means of which, between 1946 and 1951, he abstracted from the trust the whole of the holding of £10,002 Consols and converted the proceeds to his own use. This he did by forging the plaintiff's signature to seven deeds of transfer and to other documents. All the transfers were accepted by the bank as genuine, and they altered the register accordingly. Maude employed in each case Jobson Bros., Dublin stockbrokers, as selling agents, but the circumstances of each differed.

(1) The first transaction was a sale of £2,000 to Francis & Praed (Nominees) Ld., a company representing Dublin jobbers. This was comprised in a transfer bearing the date March 21, 1947, and purporting to bear the plaintiff's signature though in fact a forgery; and a cheque for the proceeds, £2,274 16s., was drawn by Jobson Bros. in favour of the plaintiff and Maude. This cheque Maude endorsed with his own name and that of the plaintiff, and attempted to pay it into his private account at Enniskillen, but that bank, being familiar with the plaintiff's signature, did not accept the endorsement as hers and wired to her in Shropshire for confirmation. She wired back on April 8, 1947, in these words: "I agree what H. W. M. wishes done." On the same day she received a letter of explanation from the bank, and she then got into touch with Maude, who allayed her anxieties, and on April 10 she wrote to the bank at Enniskillen as follows: "I have heard from Mr. Maude and it is all right "about the cheque going into his private account. I am "exceedingly sorry for all the trouble you have had over it.

" When your wire came I had not heard from him—so was not " sure what to reply. I thought it was safe to say—I conformed " to his wishes. I quite understand how you were placed over " it. Such a large sum, too. Thanks for writing to explain " about it. . . ." The story which she accepted from Maude appears in letters from him to her of April 15 and May 1. In the first he wrote: " Now as to cheque, Sweeney told me I " could sell certain stocks. There is a legacy and succession " duty to pay after all these years. You had just gone when " Jobson's cheque came so I signed for you, but if you can say " signatures are alright everything is correct. I do not think " you will have any letters from the bank as they have accepted " your telegram. I paid it into my account as otherwise I should " have had to send you every small cheque to sign. It has " nothing to do with M.C.'s account. . . ." On May 1 he wrote again: " The cheque from Jobson's was made out in our names " so I endorsed the cheque on your behalf. I now think, as you " say rightly, that I should not have done it. But the money " was badly needed."

(2) The second transaction also involved £2,000 under a transfer of April 27, 1948, to which the plaintiff's name was forged, in favour of a company representing Irish stock jobbers. The proceeds of this fraud went straight into Maude's own account by a cheque drawn in his favour by Jobson Bros. for £2,161 1s. This was managed by an authority to which again he forged the plaintiff's signature.

(3) & (4) This transaction was in two parts, being effected by two transfers, the first for £359 2s. 4d. dated February 27, 1950, and the second for £1,140 17s. 8d. dated March 2, 1950. The signature of the plaintiff was forged in each case. A cheque for the aggregate proceeds amounting to £1,509 3s. 6d. was made out to the two trustees by Jobson Bros., whereupon Maude returned it with the following letter: " Dear Mr. Jobson, I am returning your " cheque as Mrs. Welch is on her way to France and I cannot get " her endorsement. Would you please, therefore, make the " cheque out to me and I can then pay it into our account." The brokers changed the payees' names to that of the bank at Enniskillen and returned the cheque with the following letter: " Dear " Mr. Maude, We regret causing you the trouble of returning our " cheque, but as we did not realize Mrs. Welch was leaving so " soon and had no authorization letter signed by her as heretofore, " and as she is now abroad we enclose in favour of the joint " account with your bankers a cheque for £1,509 3s. 6d. Trusting

"this meets with your approval." This money was paid into the trustees' joint income account and was withdrawn by Maude the following day by means of a cheque signed by the plaintiff in blank and intended to enable him to draw income. Thus, though unknown to her, this money was for a day under her control.

(5) This transaction involved £1,502 of stock under a transfer of July 27, 1950. The plaintiff's signature was forged. The proceeds of £1,524 6s. 8d. went direct into Maude's account by means of an authority purporting to come from the plaintiff but manufactured by him.

(6) This transaction involved £1,000 under a transfer of November 23, 1950, bearing a forged signature of the plaintiff. The proceeds £1,037 7s. were dealt with as in transactions (3) and (4) and were paid into the joint income account of the trustees at Bundoran on December 11, but were promptly removed by Maude by another cheque to which he had previously obtained the plaintiff's signature while it was still blank. This money, too, though unknown to the plaintiff, had passed through her hands.

(7) The balance of £2,000 was sold under a transfer dated February 9, 1951, to which again the plaintiff's signature was forged. The proceeds of this fraud, £2,032 6s., were sent to a London account of the Provincial Bank of Ireland to the credit of another trust known as the Hewson Trust, and were in some way acquired by Maude, but without involving the plaintiff.

The entire proceeds of the holding had thus passed into Maude's hands without anyone being aware of it, and nothing was discovered until 1952. Civil proceedings were started against Maude in Ireland but he died in October, 1953, leaving no estate. The first communication made to the Bank of England was by a letter of October 7, 1952, from the Irish solicitors to the trust which contained this passage: "The above trustees hold £10,002 "4 per cent. Consols which have been sold by degrees from 1947 "up to 1952. Serious doubts exist as to the authenticity of these "transfers, and indeed the whole question of these trusts will "shortly result in an action in the Chancery Division in Dublin. On December 9, 1952, the same solicitors wrote to the defendant bank asking whether it was prepared to rectify the register on the ground that the plaintiffs' signatures were forgeries. To this the chief accountant of the defendant bank replied: "I . . . note "that an allegation is being made in the proceedings in Dublin "that the signature of Mrs. Welch to the various transfers is not "genuine. No evidence to this effect has been produced and "there is no reason at the present moment why the bank should

" take any action to replace the names of Mr. Maude and Mrs. " Welch on the register."

There was then an interval of a year while proceedings were taken in Ireland. On January 25, 1954, the Irish solicitors wrote again: " We have now sent papers to English counsel to settle " proceedings against the bank to have our clients' names restored " to the register in respect of 4 per cent. Consolidated Stock which " was sold on foot of transfers on which Mrs. Welch's signature " was forged." The bank's solicitors replied on January 29, 1954: " We should be grateful if you would let us know what " evidence of forgery it is proposed to put forward so that " the bank may have the opportunity of considering the " case." Again they wrote on February 9: " We shall be " glad if you will let us know whether there has been any " conviction on a charge of forgery arising out of this case " as we assume that criminal proceedings have been or will " be instituted. We note that Mrs. Welch will personally " repudiate her alleged signature on the transfers but as at " present advised our clients would not feel able to accept a " personal repudiation as sufficient evidence of the forgery of the " signatures in question." During further negotiations the defendant bank through their Irish agents wrote the following: " We are in receipt of your letter. . . . We feel . . . that the " bank would not have given us the instructions they did if they " had not in mind the careful consideration of their position in " the light of the available evidence." Ultimately, on April 5, 1954, they wrote the following letter: " We have now heard from " the solicitors to the Bank of England that they are not prepared " to give any written undertaking on the lines suggested, and we " understand that this matter can now be regarded as closed."

The writ in the action was issued on April 30, 1954.

The bank denied that the transfers were forged; they contended that the plaintiff was not entitled to recover because if the transfers were forged it was due to her own negligence. The bank by amendment also relied on sections 2 and 21 of the Statute of Limitations, 1939.[1]

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[1] Limitation Act, 1939, s. 2: " The following actions shall not be " brought after the expiration of six " years from the date on which the " cause of action accrued, that is to " say:—(a) actions founded on simple " contract or on tort . . ." S. 21 (1): " No action shall be brought against " any person for any act done in pursuance, or execution, or intended " execution of any Act of Parliament, " or of any public duty or authority, or " in respect of any neglect or default " in the execution of any such Act, " duty or authority, unless it is commenced before the expiration of one

The bank brought third party proceedings against five separate third parties, stockbrokers and jobbers, who had presented the transfers to them, from whom they claimed indemnities against the plaintiff's claim. Four of those third parties appeared and joined with the defendants in defending the action. The fifth of the third parties did not appear. The third parties who appeared in the action brought fourth party proceedings against the three parties who had presented the transfers to them, claiming indemnities in each case in respect of the bank's claim. Two of the fourth parties brought fifth party proceedings against the party who had presented the transfers to them claiming a similar indemnity.

The third parties who appeared conceded that if the bank were liable to restore the plaintiff's name to the register, they were liable to indemnify the bank to the extent of that liability. Similar concessions were made by the fourth and fifth parties to the third and fourth parties respectively.

Ingress Bell Q.C., *C. T. B. Leigh* and *H. A. Kershaw* for the plaintiff. Four aspects of the law have to be considered: (1) the

"year from the date on which the "cause of action accrued: Provided "that where the act, neglect or default "is a continuing one, no cause of "action in respect thereof shall be "deemed to have accrued, for the pur"poses of this subsection, until the "act, neglect or default has ceased."

Law Reform (Limitation of Actions, etc.), Act, 1954, s. 1: "The follow"ing enactments (being enactments "providing special periods of limi"tation for . . . legal proceedings "against public authorities or persons "acting in pursuance or execution or "intended execution of the Acts), that "is to say— . . . (*b*) section 21 of "the Limitation Act, 1939 . . . are "hereby repealed."

S. 7 (1): "The time for bringing "proceedings in respect of a cause of "action which arose before the pass"ing of this Act shall, if it has not "then already expired, expire at the "time when it would have expired "apart from the provisions of this Act "or at the time when it would have "expired if all the provisions of this "Act had at all material times been "in force, whichever is the later."

Finance Act, 1942, s. 47: "(1) "The Treasury may by regulations "provide . . . (b) for the keeping by "the Banks of England and Ireland "of registers of the holders of such "stock and bonds and as to the "matters to be entered in the regis"ters . . . (2) As from the date on "which the first regulations made "under this section come into opera"tion, all such stock and bonds as "aforesaid shall be transferable in "law in manner provided by regula"tions so made, and in no other "manner. . . ."

Government Stock Regulations, 1943, reg. 2 (1): "There shall be "kept in the office of the Chief "Accountant of the Bank of England, "and at the principal office at Belfast "of the Bank of Ireland, in respect of "stock of each description, registers "wherein shall be entered the names "and addresses of all persons who are "for the time being holders of stock "of that description, and the amounts "of stock of that description of which "they are respectively for the time "being holders."

effect of the forged transfers; (2) the plaintiff's capacity to sue; (3) negligence, and (4) the Statute of Limitations. The effect of the authorities is that transfers of stock by means of forged transfers or fraudulent authorities are nullities, and a court of equity will order the bank to re-invest in stock of equivalent value in the name of the original holder: *Sloman* v. *Bank of England.*[2] The property in stock is not transferred from the owner by being placed in the name of another by means of a forged document: *Davis* v. *Bank of England*[3]; see also *Oliver* v. *Bank of England*[4] and *Hildyard* v. *South Sea Co. and Keate.*[5] Forged transfers of stock by one of two trustees were held in *Barton* v. *North Staffordshire Railway Co.*[6] to be a nullity and the railway company were liable to replace the trustees on the register as shareholders.

The plaintiff's right to be replaced on the register where transfers are forged is a legal right, and the plaintiff has a right of action at law as well as a suit in equity, but if the right at law be gone the right in equity remains: *Midland Railway Co.* v. *Taylor.*[7] An executor was held unable to recover in *Brewer* v. *Westminster Bank Ld.*,[8] where his co-executor had forged cheques on the joint account and obtained unauthorized payments, as McNair J. held that the bank's obligation was a single obligation owed to the executors jointly. That case might appear on the facts to be indistinguishable from the present case, but none of the cases in equity was cited there and that case should not be followed in face of the great body of that authority.

All that the plaintiff seeks in the present case is to have her name restored to the register. She is entitled to bring this action against the bank alone in respect of the forged transfers, whatever may be the position between the bank and the persons who now appear on their books as the holders of this stock: *Barton* v. *London and North Western Railway Co.*[9]

[HARMAN J. When the plaintiff found that her signature had been forged in the first transaction she should have taken some steps about it.]

She never realized that it was really a forgery; she merely took a Victorian view that it was extremely bad manners to forge another's name to anything. She believed Maude's explanation.

On the question of negligence, the court must consider how

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[2] (1845) 14 Sim. 475.

[3] (1824) 2 Bing. 393.

[4] [1901] 1 Ch. 652; 17 T.L.R. 286.

[5] (1722) 2 P.Wms. 75.

[6] (1888) 38 Ch.D. 458.

[7] (1862) 8 H.L.C. 751.

[8] [1952] 2 T.L.R. 558; [1952] 2 All E.R. 650.

[9] (1888) 38 Ch.D. 144, 149.

1955

WELCH v. BANK OF ENGLAND.

far the conduct of the plaintiff prevents her from getting the relief for which she asks. In *Coles* v. *Bank of England*[10] a claim by executors in respect of forged transfers of stock failed because the testatrix had been guilty of gross negligence; although there was no evidence of actual knowledge of the transfers she had had the means of knowing of them. The court said that there was a ratification of the transfers. That case is the high-water mark of what could be assumed to be negligence, and it has repeatedly been criticized, notably in *Bank of Ireland* v. *Evans' Charities Trustees*,[11] where the court doubted whether *Coles* v. *Bank of England*[12] was altogether satisfactory and whether they themselves would have come to the same conclusion that the testatrix had ratified the transfers by signing receipts for reduced dividends. In *Swan* v. *North British Australasian Co. (Ld.)*[13] Blackburn J. said[14] that negligence as a defence must be in the transaction itself, and the proximate cause which leads the party into the mistake; and that it must be the neglect of some duty owing to the person who is led into the belief that the transaction is genuine. He considered that *Coles'* case[15] was not a binding authority.

Swan's case[16] was followed in *Baxendale* v. *Bennett*,[17] where the defendant was not held liable on a bill notwithstanding that he had been negligent, as his negligence was not the proximate and effective cause of the fraud, and a crime was necessary for its completion. Brett L.J. said[18] that there was no estoppel as the defendant had done nothing contrary to the truth and everyone had a right to suppose a crime would not be committed. Negligence is not imputed to trustees for leaving documents of title in the hands of one of them and allowing him to receive the income, and authority to deal with the property cannot be implied even in favour of a purchaser for value from such a trustee: *Cottam* v. *Eastern Counties Railway Co.*[19] Negligence to amount to an estoppel must be immediately connected with the transaction which is complained of, and the carelessness of the customer or his neglect to take precautions unconnected with it cannot be put forward by the banker as justifying his default: *Lewes Sanitary Steam Laundry Co. Ld.* v. *Barclay & Co. Ld.*,[20] *per* Kennedy J.[21]

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[10] (1839) 10 A. & E. 437.

[11] (1855) 5 H.L.C. 389.

[12] 10 A. & E. 437.

[13] (1863) 2 H. & C. 175.

[14] Ibid. 182.

[15] 10 A. & E. 437.

[16] 2 H. & C. 175.

[17] (1878) 3 Q.B.D. 525.

[18] Ibid. 530.

[19] (1860) 1 J. & H. 243.

[20] (1906) 22 T.L.R. 737; 95 L.T. 444.

[21] 95 L.T. 444, 447.

The plaintiff continues to be the legal owner of the shares notwithstanding the fraudulent deeds of transfer, and she must be entitled to relief unless by her conduct she has disentitled herself to it: *Tayler* v. *Great Indian Peninsula Railway Co.*[22] Nothing which the plaintiff has done would amount to the kind of negligence which the cases lay down as constituting an estoppel.

The last defence to the plaintiff's claim is the Limitation Act, 1939. The bank is not a "person" within the meaning of section 21 of the Act, which should be limited to public authorities; that section re-enacts section 1 of the Public Authorities Protection Act, 1893. At first sight it might appear that the bank was acting in pursuance of a public duty under the Government Stock Regulations, 1943, made under section 47 of the Finance Act, 1942. By the Bank of England Act, 1946, the bank had a new charter which brought the capital stock of the Bank of England into public ownership, but despite the public ownership of its stock and a different board of governors and directors it was still substantially the same body as that incorporated under the Bank of England Act, 1694, and a number of other Acts; it is still a profit-making concern. A company incorporated by Act of Parliament not only for the performance of duties of public utility but also for the purpose of earning profits is not entitled to the benefit of the Public Authorities Protection Act, 1893: *Attorney-General* v. *Company of Proprietors of Margate Pier and Harbour.*[23]

Further, the removal of the plaintiff's name from the register and the bank's refusal to restore it were not acts done in pursuance of a public duty, but in pursuance of the personal relationship between the plaintiff and her co-trustee on the one hand and the bank on the other; the bank were under a private duty to the plaintiff, not a public duty. In *Davies* v. *Gas Light and Coke Co.*[24] it was held that a right given to a shareholder by section 10 of the Companies Clauses Consolidation Act, 1845, to have a copy of the shareholder's address book was a private right conferred on him as a member of the company and not as a member of the public. In *Bradford Corporation* v. *Myers* [25] the distinction between public and private Acts was considered, and it was said that the Public Authorities Protection Act was not intended to cover every act which a local authority had to perform but only acts done in direct execution of a statute or in discharge of a public duty or in the exercise of an authority.[26] Thus the bank has the general duty to issue Consols, but once a person is accepted on the register it then becomes a private relationship and the duties of the bank are the same as those of any other person who keeps a record. [Reference was also made to *Reg.* v. *Bank of England* [27]; *Griffiths* v. *Smith* [28]; *Parker* v. *London County Council* [29]; *Turburville* v. *West Ham Corporation*,[30] and *Littlewood* v. *Wimpey (Geo.) & Co. Ld.*[31]]

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[22] (1859) 4 De G. & J. 559.

[23] [1900] 1 Ch. 749, 752.

[24] [1909] 1 Ch. 708; 25 T.L.R. 428.

[25] [1916] 1 A.C. 242; 32 T.L.R. 113.

Even if the bank were acting in pursuance of a public duty, the plaintiff's claim is not barred by statute. Her cause of action arose when the bank refused to restore her name to the register, and it was from the date of that wrongful act that time began to run under the statute: *Barton* v. *North Staffordshire Railway Co.*[32] That date was the letter of April 5, 1954, and the writ was issued on April 30 following.

By the Law Reform (Limitation of Actions, etc.), Act, 1954, the period of one year under section 21 of the Limitation Act, 1939, cannot be relied on except where time had started to run before the Act came into force and had already run out. [Reference was made to section 7 of the Act of 1954.] Section 21, however, does not apply, because the bank is not a "person" within the meaning of the section, and the act complained of was not done in pursuance of a public duty.

The bank cannot refuse to put the plaintiff's name back on the register; an attempt was made to do that in *Barton* v. *North Staffordshire Railway Co.*[33] The duty of the bank is simple: it is to see that the signatures on transfers are genuine and it cannot shelter behind the skirts of the plaintiff because it made a mistake. The bank is protected by its own action for indemnity against third parties.

The plaintiff is entitled to all dividends on the stock. Even if she should lose this case she could still ask for the dividends, for it would have been proved in court that the stock had been transferred and, as the bank pays dividends only as agent of the Treasury, she could sue the Treasury, who would not be exempt because an agent wrongfully refuses to pay dividends.

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[26] [1916] 1 A.C. 242, 247.

[27] [1920] 2 K.B. 47; 36 T.L.R. 144.

[28] [1941] A.C. 170; 57 T.L.R. 185; [1941] 1 All E.R. 66.

[29] [1904] 2 K.B. 501; 20 T.L.R. 271.

[30] [1950] 2 K.B. 208; 66 T.L.R. (Pt. 1) 1155; [1950] 2 All E.R. 54.

[31] [1953] 2 Q.B. 501; [1953] 3 W.L.R. 553; [1953] 2 All E.R. 915; affmg. [1953] 1 W.L.R. 426; [1953] 1 All E.R. 583.

[32] 38 Ch.D. 458.

[33] Ibid. 466.

Sir Andrew Clark Q.C. and *Peter Foster* for the Bank of England. It is not the case that the bank was careless; it was physically impossible for the bank to check these signatures.

The plaintiff gave a complete ratification of everything that Maude did. He sent her the documents which she signed; in fact whatever he sent to her she signed, and she regularly gave him signed blank cheques. She must be deemed to have ratified his authority to effect the transfers and authorized the proceeds to be paid into his private account.

The posting of the transfer notices by the bank to the plaintiff is constructive notice that she received them. Once the bank has proved posting the notices, the onus rests on the plaintiff to prove that she did not receive them. In fact she said that she did not remember—but even if she had seen them she would not have done anything about it. She must be deemed to have had express notice.

The relief claimed by the plaintiff is purely equitable and the action is one which lies in equity only and will not lie at law. It follows, therefore, that " 'whatever will in equity and conscience " '. . . bar the plaintiff's recovery, may be given in evidence " 'by the defendant, because the plaintiff must recover upon " 'the justice and conscience of his own case . . . only . . .' ": *per* Lord Mansfield in *Bird* v. *Randall*,[34] and cited in *Davis* v. *Bank of England*.[35]

The first transaction was clearly ratified by the plaintiff expressly; and with the knowledge of what had happened there she cannot be entitled to claim rectification in respect of the other transfers. This is a stronger case than *Coles* v. *Bank of England*,[36] because there is some doubt whether the testatrix in that case ever knew about the transactions, yet that was held to be a clear case of ratification. The plaintiff's conduct amounted to a ratification within the principle laid down in *Bank of Ireland* v. *Evans' Charities Trustees*[37]; that case only decided that mere negligence unconnected with the forgery was not a defence, since the negligence was not the proximate cause of the loss[38]: see also *Bank of England* v. *Vagliano Bros.*,[39] *per* Lord Halsbury,[40] and *Staple of England* (*Mayor, etc., of Merchants of the*) v. *Bank of England*.[41] Where, however, the blame for the loss attached to the customer (who had left blank cheques for his wife to fill up) he was unable to recover: *Young* v. *Grote*.[42] This case was discussed at length in *London Joint Stock Bank Ld.* v. *Macmillan and Arthur*.[43]

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[34] (1762) 3 Burr. 1346, 1353.

[35] 2 Bing. 393, 409.

[36] 10 A. & E. 437.

[37] 5 H.L.C. 389.

[38] Ibid. 408.

[39] [1891] A.C. 107; 7 T.L.R. 333.

[40] [1891] A.C. 115.

[41] (1887) 21 Q.B.D. 160; 4 T.L.R. 46.

The plaintiff cannot recover on the first transfer, having ratified the sale, and before the forgeries were discovered she came under a duty to warn the Bank of England, the Provincial Bank of Ireland and Jobsons that Maude had no authority to transfer stock himself. In *Sloman* v. *Bank of England*[44] Sir Lancelot Shadwell said that a regard to fair dealing requires that as soon as the criminal conduct is discovered notice of it should be given to the bank.

[HARMAN J. You say that she knew of it inferentially because she found that he had forged her signature?]

She said in evidence that she never thought about it. That might be an answer in criminal law but not in civil proceedings.

[HARMAN J. Does it make any difference that she trusted him and was lapped in a false sense of security?]

She cannot say that, because she knew that it was criminally wrong and she had been very angry. I do not say that she knew that it was her duty to warn the bank, but she should have warned the trust solicitors, who would have known what to do. She committed a breach of duty to those who trusted Maude and who might subsequently be deceived. On discovering the forgery it was her duty to see that it did not happen again. Ignorance of her duty in law is no excuse, and she neglected to give a warning at her own peril.

She has by her own conduct enabled the forgeries to take place and cannot therefore hold the bank liable. Where one of two innocent parties must suffer, the one who has facilitated the fraud must do so: *Taylor* v. *Great Indian Peninsular Railway Co.*[45]

In transactions (3), (4) and (6), where the plaintiff authorized the payments to be made into the joint account of herself and Maude, she not only ratified the transactions but must be deemed to have received the proceeds of sale. Equity will not allow a person to have both the stock and the proceeds of the sale of it, and she can only get back the stock on repayment of the proceeds of sale: *Lodge* v. *National Union Investment Co. Ld.*[46] Mention that there must be restitution was also made in *Midland Railway Co.* v. *Taylor*.[47]

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[42] (1827) 4 Bing. 253.
[43] [1918] A.C. 777; 34 T.L.R. 509.
[44] 14 Sim. 475, 489, 491.
[45] 4 De G. & J. 559, 574.
[46] [1907] 1 Ch. 300; 23 T.L.R. 187.
[47] 8 H.L.C. 751.

The plaintiff, by her gross negligence and breach of duty in failing to take any steps to prevent a recurrence of the 1947 forgery, enabled the subsequent forgeries to be perpetrated and cannot be entitled to recover in respect of any of them. Thus, in *Lewes Sanitary Steam Laundry Co. Ld.* v. *Barclay & Co. Ld.*[48] the fact that a previous forgery had been committed did not affect the position, because none of the company's directors (apart from the forger and his father) knew of it when the forger was appointed secretary; but the view was expressed there by Kennedy J. that it would have been negligence if the company had known about it. That is the only case where it was suggested that there had been a previous forgery.

McNair J. held in *Brewer* v. *Westminster Bank Ld.*[49] that the bank's liability to two executors was a single one owed to them jointly, and that they must both be parties to any action to enforce their rights as executors, but if Maude had sued as a plaintiff in the action his claim would have been barred at the outset as it was based on his own fraud, and the plaintiff's action is similarly barred.

Leonard Caplan Q.C. and *Leonard Lewis* for two third parties; *Leonard Caplan Q.C.*, *Harold J. Brown* and *G. G. Honeyman* (*Dick Taverne* with him) respectively for two other third parties. [By agreement *Caplan* argued the questions under the Limitation Act, 1939, on behalf of the defendants and the third parties.] The Bank of England is under public control; the directors are appointed by Her Majesty; the bank works under the control of the Treasury: see the Bank of England Act, 1946, ss. 2 and 4. The bank has a duty to implement the monetary policy of the day, e.g., the tightening up of the conditions on which loans should be made; the management of the national debt; the exchange control regulations. The bank has public duties of an important and extensive character.

In excluding the plaintiff's name from the register the bank was acting in pursuance of duties imposed by section 47 of the Finance Act, 1942; it was therefore acting in the intended execution of a public duty.

It is not essential for a public authority seeking to rely on section 21 of the Limitation Act to show that the particular act or default in question was done or committed in discharge of a positive duty imposed on the public authority: *Griffiths* v.

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[48] 95 L.T. 444.

[49] [1952] 2 T.L.R. 568.

Smith.[50] It is sufficient to establish that the act was, in substance, done in the course of exercising for the benefit of the public an authority or power conferred on the public authority and not being a mere incidental power; thus in *Griffiths* v. *Smith*[50] Viscount Maugham referred to *Bradford Corporation* v. *Myers*[51] as illustrating the point that where something was done not in the discharge of a public duty but merely within an incidental power, then the protection of the Public Authorities Protection Act was not available.[52] In *Firestone Tire and Rubber Co. (S.S.) Ld.* v. *Singapore Harbour Board*,[53] however, a harbour board which was admittedly a public authority was held also to be acting as a public authority when operating a warehouse.

The bank is a "person" within the meaning of the statute: *Littlewood* v. *Wimpey (Geo.) & Co. Ld.*[54] "Person" in the Public Authorities Protection Act has always been construed as meaning a person in the position of a public authority. Sir Gorell Barnes said in *The Johannesburg*[55] that public authority was not confined to municipal corporations and that many other bodies performed statutory duties and exercised public functions; the distinction was between those carrying out transactions for private benefit and those working for the benefit of the public. A public authority might undoubtedly make a profit for the public benefit. The bank did not make profits for any private individual; it worked under the Treasury in the public interest.

The Bank of England is accordingly a public authority and the claim should have been brought within one year of the cause of action arising. A cause of action arises, when it is a question of the performance of work, when it is completed; thus, in the case of a solicitor when the work was done and not when the bill of costs was delivered: *Coburn* v. *Colledge.*[56]

The cause of action arose here, if it arose at all, when the plaintiff's name was removed from the register, and not, as alleged by the plaintiff, on the bank's refusal to put it back; for that proposition the plaintiff relied on *Barton* v. *North Staffordshire Railway Co.*,[57] but Kay J. in that case referred to the analogy with a partnership, which is not a correct analogy. His conclusions in *Barton's* case[57] appear to be based on two extracts from

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[50] [1941] A.C. 170, 185.

[51] [1916] 1 A.C. 242.

[52] [1941] A.C. 170, 183.

[53] [1952] A.C. 452; [1952] 1 T.L.R. 1625; [1952] 2 All E.R. 219.

[54] [1953] 1 W.L.R. 426.

[55] [1907] P. 65.

[56] [1897] 1 Q.B. 702; 13 T.L.R. 321.

[57] 38 Ch.D. 458, 463, 464.

1955

WELCH
v.
BANK OF
ENGLAND.

Davis v. *Bank of England*,[58] but what Best L.J. said [59] in that case is really the opposite to what Kay J. supposed he had said. Thus the judgment of Kay J. in *Barton's* case [60] is really based on a misapprehension of *Davis* v. *Bank of England*,[61] and is also in conflict with *In re Severn and Wye and Severn Bridge Railway Co.*[62]

The decision in the *Severn* case [62] that time ran from the moment when the obligation should have been performed is correct, that is, when the plaintiff's name was removed from the register.

There is nothing in *Midland Railway Co.* v. *Taylor* [63] which says that the cause of action does not arise until the bank refuses to put a holder back on the register, and the House of Lords said that immediately on a wrongful transfer being done an action at law arose. Any other inference rests on a misapprehension in *Barton's* case.[64]

If that be wrong, and time only ran from the refusal of the bank, that would be the first communicated refusal. [He referred to Halsbury's Laws of England, 2nd ed., vol. 20, p. 603.]

[HARMAN J. Is it not a continuing wrong?]

The plaintiff's case is not put forward as a continuing wrong, but as specific acts done on specific days, and there is no continuing act or default within the meaning of the proviso to section 21.

In *Carey* v. *Metropolitan Borough of Bermondsey* [65] the plaintiff, who suffered personal injuries through the negligence of a local authority, issued the writ over six months after the accident, and although he was still suffering from the effects of the accident at that date he was not entitled to recover damages.

A continuing injury or damage does not mean damage which is inflicted once and for all and which continues unrepaired, but new damage recurring day by day: *Harrington (Earl)* v. *Derby Corporation*.[66] In such a case there is what Channell J. in *Carey's* case [67] called a continuing cause of action; thus where each new act causes new damage that is clearly a continuing wrong; but where no further damage occurs than that done by the first act, i.e., it is complete once and for all, then there is not a continuing wrong.

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[58] 2 Bing. 393.

[59] Ibid. 405.

[60] 38 Ch.D. 458.

[61] 2 Bing. 393.

[62] [1896] 1 Ch. 559; 12 T.L.R. 262.

[63] 8 H.L.C. 751.

[64] 38 Ch.D. 458.

[65] (1902) 20 T.L.R. 2.

[66] [1905] 1 Ch. 205; 21 T.L.R. 98.

[67] 20 T.L.R. 2, 13.

Where the negligent acts continue throughout the material period, and damage occurs from time to time by reason of that negligence, that is a continuing injury: *Boynton* v. *Ancholme Drainage and Navigation Commissioners.*[68] In the present case the defendants' wrongful act (if it be wrongful) was the removal of the plaintiff's name from the register, and at that moment she had a cause of action on which she could have sued. That was not a continuing wrong; it happened once and for all.

[Harman J. Has she not a new cause of action because of the refusal to pay dividends?]

That right arises out of the National Debt Act, 1870, but so far as the claim is for dividends the cases express the view that this not being a continuing wrong, non-payment for more than one year is barred in any event.

The fact that a duty arises out of contract does not affect the position whether or not there has been a continuing wrong. [Reference was also made to *McManus* v. *Bowes*,[69] *Compton* v. *West Ham County Borough Council*[70] and *Mountain* v. *Bermondsey Borough Council.*[71]]

The third parties, as the persons who may be ultimately liable, are entitled to raise any points which have not been raised by the defendants: *Barton* v. *London and North Western Railway Co.*,[72] *per* Lindley L.J.[73] It has already been said on behalf of the defendants that the plaintiff's claim is barred in equity. She is under the same duty to the Bank of England as a customer is to his bank; her conduct in that respect was a dereliction of duty. The only difference was that the defendants put it in equity and I am putting it at common law. Her dereliction of duty was the way in which she left the door open and enabled the frauds to be committed: *Staple of England (Mayor, etc., of Merchants of the)* v. *Bank of England*[74]; *Kepitigalla Rubber Estates Ld.* v. *National Bank of India Ld.*[75] The difference between this case and *Lewes Sanitary Steam Laundry Co. Ld.* v. *Barclay & Co. Ld.*[76] is that the plaintiff here did not act reasonably; the answer to the question what would have happened had she acted reasonably is that the forged transfers would never have taken place. She knew of the previous forgery and that Maude was in poor circumstances. What happened was exactly what one would have expected to happen. This case cannot be compared with the type of case where a company's seal is left with a clerk who was trusted.

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[68] [1921] 2 K.B. 213.

[69] [1938] 1 K.B. 98; 53 T.L.R. 844; [1937] 3 All E.R. 227.

[70] [1939] Ch. 771; 55 T.L.R. 827; [1939] 3 All E.R. 193.

[71] [1942] 1 K.B. 204; 58 T.L.R. 65; [1941] 3 All E.R. 498.

[72] 38 Ch.D. 144.

[73] Ibid. 152.

[74] 21 Q.B.D. 160.

[75] [1909] 2 K.B. 1010; 25 T.L.R. 402.

[76] 95 L.T. 444.

Whatever happens in the action would not put the plaintiff back on the register in respect of this stock; as the transferees are not before the court, there could not be a correction of the register, only compensation.

Neil McKinnon for a fourth party.

One of the third parties did not appear.

Ingress Bell Q.C. in reply. As to the negligence aspect, it is astonishing the way in which the word "forgery" has been used. With certain exceptions one must prove an intent to defraud; it was said that the plaintiff knew that Maude had already forged her signature, but she never at any time had any idea that he intended to take away the trust money or to defraud the trust. He was a person of position and her cousin; she thought that it was merely impertinent of him.

It is not wrongful to allow one trustee to control documents as it is not always possible to have them in the bank: *Cottam* v. *Eastern Counties Railway Co.*[77] Negligence, to constitute a good defence, must be something that amounts to an estoppel or ratification. To establish an estoppel it is necessary that the conduct complained of, whether active or passive in its character, was intended to bring about the result whereby the loss has arisen: *Swan* v. *North British Australasian Co.*[78] There must be in the transaction itself some duty cast on the person who is guilty of failing to perform it. If the plaintiff were negligent, her negligence was not the proximate cause; and negligence alone, even if it afforded the opportunity for the perpetration of a forgery, is not of itself a ground of estoppel: *per* Cockburn C.J. in *Swan's* case.[79] It was said in *Brewer* v. *Westminster Bank Ld.*[80] that one executor is not meant to be a watchdog over another. That applies to the plaintiff in respect of her co-trustee.

Not the least extraordinary thing is that the bank has said that it is not worthwhile to keep staff to look at signatures and check them against originals.

[HARMAN J. Because it is impracticable; there are four million shareholders.]

It was also pleaded that the plaintiff should have looked at the income account, but that was not persisted in. The notices sent out by the bank were also relied on, but there was no evidence of posting or reception, only that the normal procedure was followed. But in *Barton* v. *London and North Western Railway Co.*,[81] although the plaintiff had disregarded the notices received by her she was not estopped from saying that the transfers were invalid.

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[77] 1 J. & H. 243.

[78] 2 H. & C. 175, 188.

[79] Ibid. 189.

[80] [1952] 2 T.L.R. 568.

With regard to the dividends, the plaintiff cannot bring an action in respect of them until the register is altered. The bank can only pay dividends to registered holders; and the plaintiff cannot claim dividends without claiming rectification of the register. If the action for restoration to the register is not barred the action for dividends will not be barred.

This is not a claim in debt; it is a claim for the rectification of the register. The Bank of England is the keeper of the register, and I am concerned to see they do their work properly.

[HARMAN J. Suppose they have paid that money away to someone else, they are not in funds to pay the dividends.]

They can pay them out of their profits like anyone else who has to pay damages. Whatever may be the position as to the past, the plaintiff is entitled to all future dividends.

As an alternative to the argument that time only ran from the refusal to restore the plaintiff to the register, it is submitted that the bank's duty is a continuing one; if the certificates were lost they would have to be replaced, and that obligation would continue. Their duty to keep the register correct must be a continuing one; it arose as soon as they wrongfully removed the plaintiff's name from the register and it continues so long as the register is not corrected; because the government loan by the terms of its issue was not yet repayable and the plaintiff cannot have lost by lapse of time her right in due course to be repaid. While her right to repayment remains, her right to be on the register must also remain.

It has been discussed whether this is an equitable claim. It is an example of the auxiliary jurisdiction of equity, where the plaintiff to get her legal rights had to call in equity; the legal right is to have the plaintiff's name put back on the register, but common law had no such remedy and plaintiffs had to go to Chancery, who could make a personal order on the defendant. It was said that it is necessary to do equity in order to get equity; that only means what is right and proper. The maxim "He who "seeks equity must do equity" must apply as much to the bank as to the plaintiff. It would not be equitable if she were put back on the register only on the condition of repaying the money received on the sale of the stock; that would still leave her open to an action by third parties; and in fact she never received this money. She was never aware of the payments until 1952 and could not therefore have ratified them.

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[81] (1889) 24 Q.B.D. 77.

The original plea that the transfers were not forged was dropped after evidence at considerable length for the plaintiff was given.

Cur. adv. vult.

Feb. 24. HARMAN J., having stated the facts as above set out, read the following judgment: That an action of this type will lie against the defendant bank without joining the transferees of the stock is shown by a number of cases of which the earliest to which I was referred was that of *Davis* v. *Bank of England*,[1] decided in 1824. It was an action at law and it was held by Best C.J. that the property in the stocks in question was never transferred from the true owner by being placed in the name of another person in the books of the bank under a forged power of attorney. The sidenote reads [1]: "*Held*, that a "party might recover from the Bank of England the dividends "arising on his stock in the funds, though at the time the "dividends were payable he knew the stock had some months "previously been placed, under a forged power of attorney, to "the name of another person; omitted to inform the Bank of the "circumstances; and did not demand payment of the dividends "till after the escape of the offender. Property in stock is not "transferred from the owner by being placed, under a forged "power of attorney, to the name of another person in the books "of the Bank of England." Best C.J. says [2]: "The first "question we are to decide is, have the stocks which stood in the "plaintiff's name in the books of the bank been transferred out of "that name? We think that the plaintiff's property in the funds "has not been transferred; that he is still the legal holder of these "funds, and entitled to the dividends payable on account of them." Then he goes on to describe the 3 per cent. Consols, and the long annuities, and says [2]: "Both the consolidated annuities "and the long annuities are transferable at the bank. This is not "a species of property that could be transferred by delivery; the "assent of the owner to part with it must be expressed in

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[1] (1824) 2 Bing. 393.

[2] Ibid. 402.

"writing, and it will be found that it has always been the "practice to transfer by writing, and that the case requires such "a mode of transfer. I take it to be clear that a transfer in "writing not made by the party transferring, or some agent duly "authorized, can have no effect. A forged indorsement on a bill "of exchange conveys no interest in such bill. Transferable "shares of the stock of any company cannot be divested out "of the proprietors by any act of the company without the "authority of the stockholders. The Bank of England has no "more authority to affect the interest of any stockholder than "the most insignificant chartered company has to dispose of the "shares of any of the members of such a company. The legis-"lature (so far from allowing any act of the bank to deprive the "stockholder of his interest,) has taken care to direct in what "manner the interest he has in the public annuities shall be "conveyed away, and to declare that no other mode of convey-"ance shall be legal."

Best C.J. then discusses the mode of transfer at some length and says this[3]: "We are not called on to decide whether the "bank, the parties who presented the forged power of attorney, "or the parties who accepted the stocks under the transfer are "to endure the loss. We know that funds will not be issued "from the exchequer to pay the dividends on the stock in the "plaintiff's name, and the same stock in other persons' names. "We feel that these circumstances may occasion difficulty and "embarrassment to the bank. We think, however, that the "bank should be subjected to such difficulty and embarrassment, "rather than the stockholder should suffer injustice. It is the "duty of the bank to prevent the entry of a transfer until they "are satisfied that the person who claims to be allowed to make "it is duly authorized to do so. They may take reasonable "time to make inquiries and require proof that the signature "to a power of attorney is the writing of the person whose "signature it purports to be. It is the bank, therefore, and "not the stockholder who is to suffer, if *for want of inquiring*, "and it does not appear that any inquiry was made in this case, "they are imposed upon, and allow a transfer to be entered in "their books, made without a proper authority. We cannot do "justice to this plaintiff unless we hold that the stocks are still "his." Then he continues in these terms[3]: "Another conse-"quence of the stocks being considered as transferred will be

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[3] 2 Bing. 393, 404.

"most alarming to those who live at a distance from *London*, "and receive their dividends by attorney; namely, that their "claim to compensation in case their stocks should be transferred "without their authority may be barred by the statute of limitations. What has lately occurred has shown us that the "forging of powers of attorney to transfer stock may be concealed for more than six years, and the cases of *Battley* v. "*Faulkener*,[4] *Short* v. *M'Carthy*[5] and *Brown* v. *Howard*,[6] prove "that the Statute of Limitations begins to run from the time of "the act being done that gives occasion to the action, although "it was not known to the party who suffers from it. I can find "no case in which the question whether the stock is transferred "by the act of the bank has been raised."

He discusses that matter and goes on[7]: "These stocks "remaining the property of the plaintiff, and his right to them "not being affected by the forgeries, what is to prevent his "recovering the dividends due in respect of such stocks? It "appears in this case that he did not know of the forgeries until "several months after they were committed." He discusses then whether the fact that the plaintiff, because he had allowed the forger to escape from the country before claiming and thus had been guilty, as it was said, of misdemeanour or felony, was disentitled on that account, and he held that he was not.

This case was reversed in error on a point of pleading which does not affect the ratio decidendi of Best C.J. (see the references in *Barton* v. *North Staffordshire Railway Co.*[8] and *Coles* v. *Bank of England*[9]). The plaintiff in *Coles*[9] lost her action on the finding of the jury that she had ratified each transaction. It appears that she went to the bank with her nephew, the villain of the piece, and signed the warrants for the reduced dividends personally. The question is stated in the argument in these words[10]: "But the principal question is, whether the Bank of "England can be made liable in this, or indeed in any, form of "action to replace stock transferred by a person professing to "act for the proprietor, after the proprietor has repeatedly "recognized the transfer by receiving dividends on the reduced "amount? The repeated receipt of such dividends is a recognition of the transfer, which binds the party, and is not merely "proof of a previous authority, which may be rebutted."

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[4] (1820) 3 B. & Ald. 288.

[5] (1820) 3 B. & Ald. 626.

[6] (1820) 4 Moore 508.

[7] 2 Bing. 393, 408.

[8] (1888) 38 Ch.D. 458, 464.

[9] (1839) 10 A. & E. 437.

[10] Ibid. 442.

Lord Denman C.J. says [11]: "The facts proved on the trial "were very remarkable. Benjamin Coles, the nephew of the "testatrix, and in some sort her man of business, one of her "executors also, and of course one of the plaintiffs, was a clerk "in the Bank of England, and was in the habit of accompanying "the testatrix when she received her dividends. She signed "receipts both in the dividend warrants and in the bank books. "He must have paid her the full amount of dividend that would "have been due if the original amount of stock had continued "in her name; but he had in fact, in the interval, taken another "woman to the bank, who personated the testatrix from time to "time, and, as often, forged the signature of the testatrix to "several transfers of the stock, till at last a very small sum was "left."

A little further on he says [12]: "The argument was, that the "testatrix had, by gross negligence, brought about, or at least "greatly contributed to produce, the loss which has accrued, so "that her representatives are precluded from complaining of the "bank in respect to it."

He then discusses the cases, among others *Davis* v. *Bank of England*,[13] and ends in this way [14]: "The facts, then, which "have been found by the jury in this case entitle the defendants "to a verdict on the plea of not guilty. They also furnish "evidence on the second and third pleas, in which it is alleged "that the testatrix was not a proprietor of the stock; for we are "of opinion that, notwithstanding the strong words of statute "18 Geo. 2, c. 9, a stockholder may so conduct himself as to be "precluded from claiming in that character. For example, the "transfer is only to be made by underwriting by the parties, or, "in their absence, by lawful attorneys appointed with certain "formalities. But suppose the proprietor, being present, had "not underwritten the transfer, but had connived at the underwriting of his name by another; or, being absent, had expressly "requested another to go and sign his name, the Act would not "have been complied with, yet the property would have passed "from the stockholder. In such a case, indeed, fraud would "have been an ingredient, but we apprehend that any culpable "conduct, by which the relation of the parties to the property is "completely altered, will have the same effect."

The point was taken in the defence that as the interest of the plaintiff and Maude in the stock was a joint one she could have no better right than he had to complain. I take it that the pleader relied on the recent case of *Brewer* v. *Westminster Bank Ld.*,[15] which appears to have been decided on these grounds. I confess that I do not follow that decision. None of the cases in equity were cited to the judge. It may be, however, that this would be a good defence at law. It is certainly, I think, no defence in equity.

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[11] 10 A. & E. 437, 448.

[12] Ibid. 449.

[13] 2 Bing. 393.

[14] 10 A. & E. 451.

In *Sloman* v. *Bank of England*[16] the sidenote reads: "One "of two trustees of a sum of stock sold it out under a power "of attorney, to which he had forged the signature of his "co-trustee, and some time afterwards absconded. *Held*, that "the Bank of England was compellable, in a Court of Equity, to "reinvest the stock in the name of the other trustee."

Sir Lancelot Shadwell V.-C. in his judgment says[17]: "I "have not the slightest doubt with respect to the situation in "which the bank stands. The liability of the bank is constituted "by the Act of 11 Geo. 4 & 1 Will. 4, c. 13, by which the four "per cents. were converted into three and a half per cents." Then he discusses that and says[18]: "I notice that with reference "only to that singular ground on which the Court of King's "Bench rested their judgment in the case of *Davis* v. *Bank* "*of England*,[19] when it was heard in error; namely, that "inasmuch as the declaration did not allege that the requisite "funds for payment of the dividends had been supplied to the "bank by the Government, there was no liability on the part "of the bank. Now it seems to me that every court of law "ought to take it for granted that that which the legislature "says shall be done has been done but, however, the Court of "Error was satisfied to get rid of any difficulty in that case by "making that objection."

He then deals with the statute as to the mode of transfer and says[20]: "And my opinion is that if, at any time there "had been stock standing in the name of A., and afterwards "that stock did not appear (no matter from what cause), to be "standing in his name, A. would, prima facie, have a right to "say: 'Let the account stand as it did on a given day.' If it can "be shown that A. himself has transferred the stock, that is an "answer; but the bank account ought to be kept with regard "to every individual who ever appeared as a stock proprietor

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[15] [1952] 2 T.L.R. 558; [1952] 2 All E.R. 650.

[16] (1845) 14 Sim. 475.

[17] Ibid. 485.

[18] Ibid. 486.

[19] 2 Bing. 393.

[20] 14 Sim. 486, 487.

"in such a manner as to show what the account really is. If "that be so, it follows, as a matter of course, that relief may "be had in equity; because the plaintiff in equity has to allege "against the bank: 'You are bound by law to be my book-"'keeper in respect of my stock, and to show me the true "'account of it; and if I can show that, upon a given day, stock "'stood in my name, and now show that it does not stand in "'my name, and I have not authorized the transfer of it, you are "'responsible to me—that is to say, you must make the account "'stand as it ought to have stood.' This appears to me to be "the true view of the case; and, according to that view, there "would be a direct right in every person who was interested in "the stock in question to file a bill against the Bank of England "to have any error occasioned by the bank corrected."

He then goes on to the question whether the bank's defence, which again depended on the fact that there had been connivance between the plaintiff and the forger, was good, and the Vice-Chancellor held that there was no defence set up which would avail the bank.

A later case is *Barton* v. *London and North Western Railway Co.*,[21] where the Court of Appeal affirmed that this form of action is a proper one. Cotton L.J. says this[22]: "The plaintiffs "by this action seek to impeach transfers of a considerable "amount of London and North Western stock. They allege that "the deeds of transfer were forgeries, and they bring their action "against the London and North Western Railway Company "alone, in order to make them answerable for stock not still "appearing in the names of the plaintiffs or in the name of their "testator. Now, in my opinion, whatever may be the con-"sequence as between the railway company and other persons "who now appear on the railway books as the holders of this "stock, that was a course which the plaintiffs were at liberty to "take, for it is well established that persons, whose stock is "transferred out of their names in consequence of a forged deed "of transfer, may go against the company whose duty it is to "keep the register of stockholders, and say: 'It was your duty "'to keep this stock in our names until it was effectually trans-"'ferred by a deed of transfer duly executed by us or by persons "'who had authority to act for us, and as you have transferred "'it without the authority of a good deed of transfer you must "'replace it.' That is the course which the plaintiffs took. If

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[21] (1888) 38 Ch.D. 144.

[22] Ibid. 149.

"they had sought to have the stock which they could trace into "the names of the present appellants re-transferred, then, of "course, they must have made the present appellants parties, "and, in my opinion, they might have done so if they thought "fit, making the railway company a party as the keeper of the "books, that the company might be bound by the order to "re-transfer the stock in their books. The plaintiffs have not "chosen to take that course, but have taken a course which they "were fairly entitled to take if they thought fit."

That case was afterwards sent to law for the question of forgery to be tried and is reported on appeal.[23]

The first issue at the trial before me was one of fact, namely, whether the signatures appearing on the several transfers and authorities and purporting to be those of the plaintiff were truly hers. On this subject the plaintiff and an expert in handwriting gave evidence, and on the third day of the trial counsel for the defendant and for the subsequent parties abandoned their case on this point and admitted that none of the signatures impeached was genuine.

The second point taken by the defence is that granting the signatures not to be in the hand of the plaintiff yet she authorized them to be made. This point was abandoned.

Thirdly, it was objected that the negligence and dereliction of duty of the plaintiff as one of the trustees gave Maude, as the other trustee, the opportunity of committing the frauds. I do not follow the point as taken like this. The defendant bank is no beneficiary under the trust and is owed no duty by the plaintiff in her capacity as trustee. The argument, however, proceeded on a different ground and was that the conduct of the plaintiff vis-à-vis the bank was so negligent as to disentitle her to relief. It was argued that the plaintiff and the defendant bank stood in the relationship of customer and banker and that she owed to the defendant bank a duty accordingly. I am content to accept this.

In my judgment it is clear from the cases on this subject that no negligence can avail the defendants unless it amounts to conduct estopping the plaintiff, or, alternatively, to ratification of the defaults of her co-trustee. Moreover, the loss must be a direct result of the negligence.

The leading case on this point is *Young* v. *Grote*,[24] a case

[23] (1889) 24 Q.B.D. 77.

[24] (1827) 4 Bing. 253.

much discussed but expressly approved by the House of Lords in *London Joint Stock Bank Ld.* v. *Macmillan and Arthur.*[25]

An illustration of this principle in connexion with share transfers is *Swan* v. *North British Australasian Co. Ld.*,[26] where I find in the headnote these words: " Negligence, to " operate as an estoppel, must be the proximate cause of the " loss." See, too, *Bank of Ireland* v. *Evans' Charities Trustees.*[27] In that case charity trustees had allowed their seal to remain in the possession of the secretary who by that means misappropriated certain Consols. There were proceedings for a new trial of an action by the trustees against the bank to rectify the register, in which the judge in Ireland had charged the jury that if the trustees had so negligently conducted themselves as to contribute to the loss the verdict must be for the bank. This was held to be wrong. Lord Cranworth L.C., in his speech after the opinion of the judges had been given by Parke B., said this: " There are two points for decision." [28] The first was one of pleading, with which I need not be concerned. Then he said [29]: " For the reasons which have been so clearly stated on the part " of all the learned judges, my opinion is, and I shall move your " Lordships accordingly to act upon it, that it is clear that there " ought to have been a venire de novo, because the direction of " the very learned judge who tried the case was clearly not " warranted by law. The direction was, that if the transfer was " caused by such negligence on the part of the trustees as that of " which evidence has been given, then that the bank was absolved. " I apprehend that there is no such principle of law. I think " it has been fairly put, that there must be either something " that amounts to an estoppel, or something that amounts to a " ratification, in order to make the negligence a good answer. " Now the case of *Young* v. *Grote* [30] went upon that ground " (whether correctly arrived at in point of fact is immaterial) " that the plaintiff there was estopped from saying that he did " not sign the cheque for £350; and if the circumstances are " such, whether arising from negligence or from any other cause, " that as between the customer and his banker the customer is " estopped from saying that he did not sign the cheque for a " particular amount, that, as between them, is just the same as " if he had signed it. Therefore taking that view of the facts, " the case may be well sustained, and appears to have been

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[25] [1918] A.C. 777; 34 T.L.R. 509.

[26] (1863) 2 H. & C. 175.

[27] (1855) 5 H.L.C. 389.

[28] Ibid. 412.

[29] Ibid. 413, 414.

[30] 4 Bing. 253.

"well decided. The other doctrine, that of ratification, is well "illustrated by the case of *Coles* v. *Bank of England*.[31] There "the Court of Queen's Bench considered that the conduct of "the owner of the stock in subsequently signing from time to "time receipts for reduced sums, when the sums had been "reduced by previous forgery, was in truth a ratification of what "had previously taken place. Whether I should have arrived "upon the question of fact at the same conclusion, is a matter "upon which I do not feel myself called upon to speculate. That "certainly seems to me to be rather a strong result. But coming "to that result, the consequence naturally and necessarily "followed, whether forgery or no forgery, that if the party injured "by the forgery chooses subsequently to ratify what has been "done, then as between him or her and the person who acts "upon it, the ratification would be just as good as if it had been "the previous act of the party.

"Upon these grounds, I conceive that the judgment which "the Court of Queen's Bench in Ireland ought to have given, "and which ought now to be given, when the exceptions are "properly on the record, is, that there should be a venire de "novo, and I shall move your Lordships accordingly." Lord Brougham concurred in that opinion.

The negligence here attributed to the plaintiff was first that in the circumstances I have recited she should have realized after the first transaction that Maude had forged her signature to a transfer and should so have informed the defendant bank by way of warning. As to this, I am of opinion that she never realized, although she might have done so, that her signature had been forged on a transfer. What she did know was that Maude had put her name on the back of a cheque, but after his explanation she did not think there was any dishonest intent in this and certainly did not regard it as a criminal offence. She is a lady now 84 years of age, brought up with Victorian notions about business; namely, that women have nothing to do with it and should leave it to the men. No doubt under the circumstances she ought not to have allowed her sister to appoint her trustee, but she said in the witness-box that she was appointed to "look "after the boy"—meaning by that the tenant for life—who was afflicted as I have said. She also said that she was content to leave the business side of the trust to Maude who was her cousin and whom she trusted implicitly, and that she was willing to sign anything he put before her. Presumably he did not put the transfers before her because an attesting witness was necessary and this might have given rise to questions.

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[31] 10 A. & E. 437.

Next it was alleged as negligence that, if the plaintiff had watched the pass-book of the joint income account, she would have noticed that the dividends on the Consols were dwindling. As to this, there was no evidence that she ever saw the pass-book, and I do not think there was a duty on her vis-à-vis the bank to be a watch-dog over her co-trustee (see the observations of McNair J. in *Brewer* v. *Westminster Bank Ld.*[32]). It was also suggested that there was negligence in allowing Maude to be in possession of the stock certificates, but this has been decided not to be negligence in *Cottam* v. *Eastern Counties Railway Co.*[33] This also was a case of forged transfers and the sidenote reads as follows: "Negligence cannot be imputed to trustees for "leaving documents of title in the hands of one of their number "and allowing him to receive the income, and no authority to "deal with the property can be implied, even in favour of a "bona fide purchaser from such trustee." The transferees were there joined as defendants and the Vice-Chancellor's judgment is mostly concerned with that point, but he deals with negligence in these words[34]: "There is nothing to point to any implied "agency, except the supposed negligence of the plaintiffs in "leaving the deeds in Allen's hands, and allowing him to receive "the interest. It would be a very serious doctrine if the fact "that one of three trustees is allowed to have possession of the "title-deeds of the trust should be held to create such an "interest in him as to enable him to give a title to any other "person with whom he may deposit the deeds. The contrary of "this was expressly held by Sir J. Leach, in an unreported case, "*Goldney* v. *Bower*,[35] where the title-deeds of a mortgage to "trustees were allowed to remain in the hands of one of the "trustees, who also received the interest. There it was held "that no agency to receive the principal could be implied from "the permission to receive the interest, and that no laches could "be imputed to the trustees for suffering one of their number to "hold the deeds. The reason is, that the deeds must be held by "some one person, unless they are deposited with bankers, or "placed in a box secured by a number of different locks, of which "each trustee should hold one of the keys; and negligence cannot

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[32] [1952] 2 T.L.R. 558, 573; [1952] 2 All E.R. 650.

[33] (1860) 1 J. & H. 243.

[34] Ibid. 247.

[35] Unreported.

"be imputed to trustees for not taking such precautions as "these."

Another point raised by way of defence and as showing negligence on the part of the plaintiff was that on every transfer a notice in the usual form was sent to her in accordance with regulation 9 of the Government Stock Regulations, 1943 (S.R. & O. 1943, No. 1). An attempt was made to prove the sending of these notices as a fact and it was shown, I think, that in each case a notice was made out to be sent, but it was never shown that notices were actually sent. Still less was it shown that the plaintiff received them, for if sent they all went to the Irish address as was probably the design of Maude when he entered this as the address of the plaintiff in the removal document of 1946.

The case of *Barton* v. *London and North Western Railway Co.*[36] shows that even if the notices had been shown to have been sent to the plaintiff and received by her that would have been no answer. In the headnote I find this: "Application having "been made to a company to register a transfer of stock, the "company sent a letter giving notice of it to the holder of the "stock on the register, and stating that, unless they heard from "her to the contrary, the stock would be transferred in their "books. She did not answer the letter, and the company subsequently registered the transfer. Her signature to the transfer "being a forgery, she brought an action against the company "claiming to have her name replaced on the register as holder "of the stock:—*Held*, that she was not estopped from alleging "that the transfer was invalid, and was entitled to the relief "claimed."

Lindley J.[37] says: "I was somewhat struck at first by "the point raised by the defendants with regard to the last of "the forged transfers, but I think that it will be seen that there "is nothing in it, when it is remembered that the plaintiffs in "this action are really asserting a legal title. With regard to the "suggestion of an estoppel, there appears to me to be no ground "for it whatever."

Lord Esher M.R.[38] says: "With regard to the last transfer, "of which notice was sent to the plaintiff, it is alleged that, "having disregarded such notice, she is estopped from saying "that the transfer is bad, or if she is not estopped, that,

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[36] 24 Q.B.D. 77.

[37] Ibid. 89.

[38] Ibid. 87.

"as she is claiming equitable relief, if she has misled the "defendants by not answering their letter, to that extent she is "not entitled to such relief. This latter point does not, as it "seems to me, arise, because in substance what she is claiming "is to have the register made right, which is her legal right as "a shareholder; and I cannot think that the circumstances bring "the case within any kind of estoppel."

This last case suggests that the plaintiff's right is a legal right. That also was the opinion of the House of Lords in the similar case of *Midland Railway Company* v. *Taylor*,[39] on appeal from Sir John Romilly M.R.[40] It is a case which shows that even if the right at law be gone, the right in equity will remain —see the speech of Lord Westbury L.C., who says[41]: "The "matter rests on the plainest and clearest principles. Certain "stock of the Midland Railway Company was standing in the "book of the company in the names of two persons, Taylor and "Bright. Bright, by a transfer executed by himself in Taylor's "lifetime, and to which he forged the name of Taylor, trans-"ferred that stock to a third person. Immediately on that act "being done, there was a right of action at law in Taylor against "the railway company, and there was also a right of suit in "equity. The right of suit in equity and the right of action at "law were both founded upon a legal title; that legal title vested "in Taylor, remained with him, and is now vested in the "present plaintiff, his personal representative."

Lord Cranworth said[42]: "It is said that the right in "equity is dependent on there being a right of law. That is a "mistake; it is not dependent on such a right at law. There "would have been no right in equity if there had not been a "wrong, which would have entitled the party to bring an action "at law . . ."

It appears to me that in the case of transactions (2), (5) and (7) the direct cause of the loss was the felonious act by Maude in forging the defendant's name on the transfers and the authorities to the brokers, and that it follows from the authorities that the negligence of the plaintiff not being directly connected with the loss is no part of her claim. Nor can I find in the facts anything to amount to an estoppel or which should be taken as ratification of her co-owner's defaults. But when transaction (1) is examined the position is seen to be different in that it can be said that the plaintiff expressly authorized the broker to pay the proceeds of the sale of £2,000 of stock into Maude's private account and that this amounted to a ratification of the transaction. In my judgment, this is right. It seems to me clear that the plaintiff knew that the cheque for £2,274 16s. did not represent income, but was capital which she allowed Maude to have because she believed he required it to pay duty as his letter said. She therefore had the opportunity of stopping the money from passing to him, in which case no harm would have been done, but allowed it to pass through her hands. She must, I think, therefore, be taken to have received this sum.

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[39] (1862) 8 H.L.C. 751.

[40] (1860) 28 Beav. 287.

[41] 8 H.L.C. 751, 756.

[42] Ibid. 757.

As to transactions (3), (4) and (6), the proceeds in each case passed into the joint income account of the plaintiff and Maude, and here again no harm was done so far, but Maude was administering the income in maintaining the estate for the tenant for life, and the plaintiff was in the habit of giving him from time to time blank cheques signed by her to enable him to draw the income. By means of these he was enabled to withdraw the capital sums resulting from each of these three transactions and, therefore, the act which produced the harm was the genuine signature of the plaintiff to the blank cheques. In these cases I think the plaintiff must be treated as having come into possession of the proceeds, and that her negligence in providing her co-trustee with blank cheques was the direct cause of the loss.

It appears to me, moreover, that equitable principles must prevail, because even though the right of the plaintiff be a legal one the remedy she seeks is equitable. She asks that the defendant bank shall be obliged to go into the market and purchase sufficient stocks to make good the forgeries, and that, in my judgment, is her right; but in so far as she must be taken to have had the proceeds of these same forgeries in her hands, or directly to have caused the loss, I think she must contribute to the price the defendant bank would have to pay—the amount of those proceeds. No doubt this may be hard on the beneficiaries, but they have other remedies open to them.

This line of defence is not open to the bank in respect of transactions (2), (5) and (7), because in each of these cases the proceeds went direct and without her intervention into a banking account not that of the plaintiff. These three transactions amount to £5,502 (nominal) so that, as a short cut, the defendant bank must replace stock to that extent unless it is protected by the last line of defence, which is that of the Limitation Act, 1939.

This plea was not advanced by the bank in the earlier stages of the action but was resorted to because the subsequent parties over against whom the bank is claiming indemnity desired to avail themselves of it. The bank, just before the hearing, put its pride in its pocket and applied to amend by pleading two sections, namely, 2 and 21. I allowed the amendment on terms. Section 21 was repealed by the Law Reform (Limitation of Actions) Act, 1954, but having regard to section 7 of that Act the repeal does not affect the present proceedings.

Section 21 is to be considered first because, if it applies and time runs from the date of the several transfers, the whole action is barred. [His Lordship read section 21 of the Limitation Act, 1939.]

The first point taken in reply by the plaintiff was that the bank was not a person within the meaning of the section, and reliance was placed on *Attorney-General* v. *Company of Proprietors of Margate Pier and Harbour.*[43] In my judgment, having regard to the terms of the Bank of England Act, 1946, the bank is not a profit-making company as now constituted and this case has no application. It has been said that section 1 of the Public Authorities' Protection Act, 1893, re-enacted by section 21, must be limited to " public authorities "—see the speech of Lord Buckmaster in *Bradford Corporation* v. *Myers.*[44] I take it, however, that by these words Lord Buckmaster meant bodies having public or statutory duties to perform.

Secondly, it was objected that the act or default in question was not done or omitted " in pursuance or execution of any Act " of Parliament or public duty or authority," and reliance was placed on *Bradford Corporation* v. *Myers.*[44] Lord Buckmaster in that case said this[45]: " Now it must be conceded that the Act " applies only to a definite class of persons and to a definite class " of action. If the section stood alone, and were construed without reference to the introductory words of the statute, it would " be wide enough to grant protection to any person who was " acting in pursuance of a private Act of Parliament, but on more " than one occasion the courts have pointed out that this cannot " be its true interpretation, and that 'any person' must be " limited so as to apply only to public authorities. The case of " *Attorney-General* v. *Company of Proprietors of Margate Pier* " *and Harbour*[46] is an excellent illustration of such a case, and " this was expressly approved by Channell J. in *Parker* v. *London* " *County Council.*[47] While the preamble is necessary thus to

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[43] [1900] 1 Ch. 749.

[44] [1916] 1 A.C. 242; 32 T.L.R. 113.

[45] [1916] 1 A.C. 242, 247.

[46] [1900] 1 Ch. 749.

[47] [1904] 2 K.B. 501; 20 T.L.R. 271.

"constrict the meaning of the persons whom the statute is "intended to protect, the words of the section themselves limit "the class of action, and show that it was not intended to cover "every act which a local authority had power to perform. In "other words, it is not because the act out of which an action "arises is within their power that a public authority enjoy the "benefit of the statute. It is because the act is one which is "either an act in the direct execution of a statute, or in the "discharge of a public duty, or the exercise of a public authority. "I regard these latter words as meaning a duty owed to all the "public alike or an authority exercised impartially with regard "to all the public. It assumes that there are duties and authorities which are not public, and that in the exercise or discharge "of such duties or authorities this protection does not apply." In my judgment, however, the keeping of the register of Consols is clearly a public duty enjoined on the Bank of England which still answers the description by the Vice-Chancellor in *Sloman's* case [48] of "the parliamentary book-keepers of this fund." The keeping of the register is now regulated by Government Stock Regulations, 1943, made under section 47 of the Finance Act, 1942, and having statutory force. [His Lordship read section 47 of the Finance Act, 1942, and regulation 2 of the Government Stock Regulations, 1943.]

In my judgment, the keeping of the register and the removal of the plaintiff's name from it, as also the refusal to reinstate it, were acts done directly in intended execution of the Act of Parliament. Accordingly, I hold that the section applies to the defendant bank in this capacity.

The next point is whether time has run. This depends on the time at which the cause of action accrued. This question was considered in *Barton* v. *North Staffordshire Railway Co.*,[49] where Kay J. held that the cause of action was not perfect until the refusal of the bank to restore the plaintiff's name to the register. In my judgment, there was no such categorical refusal here until the writing of the last letter, which I have read, on April 5, 1954. If, therefore, this case be right, time has not run. The headnote reads [49]: "One of two executors cannot make a valid transfer "of railway shares or stock registered in the names of "both, under and subject to the provisions of the Companies "Clauses Act, 1845. Railway stock was registered in the names "of two persons who were executors and trustees of a will. One of

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[48] 14 Sim. 475, 486.

[49] 38 Ch.D. 458.

"them sold and transferred the stock, forging the signature of "the other to the transfers, which were registered by the railway "company. On the forgeries being discovered by the other "executor, a new trustee of the will was appointed in place of "the forger, who then left this country. The two trustees "informed the company of the forgeries, and applied to be "registered as owners of the stock. The company refused to "comply with the application, and the two trustees thereupon "brought an action for replacement of the stock in their names. "Some of the stock was transferred more than six years before "the action was brought:—*Held*, that the cause of action was "the refusal by the company, when the forgeries were made "known to them, to treat the plaintiffs as owners of the stock, "and that, therefore, time under the Statute of Limitations would "not begin to run against the plaintiffs until such refusal:—*Held*, "also, that the plaintiffs were entitled to treat the transfers as "nullities, and that the company must be ordered to register "the plaintiffs as owners of the stock."

Kay J., in his judgment, says[50]: "The real claim of the "plaintiffs is to be treated by the railway company as stock-"holders. They say, and I agree with the contention, that the "forged transfers must be considered as nullities. One defence "raised by amendment is a plea of the Statute of Limitations. "The actual plaintiffs are Ann Barton and Mrs. Ashe, who was "appointed her co-trustee by the deed of July 1, 1886, in the "place of Thomas Barton. This suit was instituted on Decem-"ber 10, 1886, more than six years after some of the attempted "dealings with this stock. It is settled that, after a partnership "has ceased, any claim on simple contract by one former partner "against the others in respect thereof is, prima facie, subject to "be barred after the expiration of six years: *Knox* v. *Gye*.[51] "On the other hand, while a partnership is continuing there is "no authority for suggesting that a claim between the partners "is affected by the statute, and the opinion of Lindley L.J. is "to the contrary (Lindley on Partnership, 4th ed., p. 966). In "a case of exclusion time would begin to run from the act of "exclusion. It has been argued in this case that if a partner "does not draw his share of profits or act as partner for six "years he, at the end of that time, loses all remedy against his "co-partners, and therefore practically ceases to be a partner. "And it is urged that this being the case as to a partnership,

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[50] 38 Ch.D. 458, 462–4.

[51] (1872) L.R. 5 H.L. 656.

"the analogy ought to be followed in railway companies and "other trading corporations, and that a shareholder or stock-"holder who makes no claim for six years has no remedy in "respect of his shares or stock against the company. If this "be so, any such company might direct that after six years' "silence a pen should be drawn through the shareholder's name "on the register, and he would practically cease to be a member "of the corporation; and in answer to a question from the court, "the argument was pressed to that extent. Such a conclusion "shows that there must be a fallacy in the premises. I know of "no authority for saying that a partner who does nothing for six "years loses all remedies against his co-partners. Time only "begins to run against him from an act of exclusion. If the "analogy be applicable there must be a similar act in the case "of a shareholder to enable the company to avail itself of the "statute against him. Nothing of the kind took place here "until the resistance by the company to the claim made in this "action. The cause of action is, not the invalid transfers of the "stock in question, but the refusal of the company, when the "forgery was made known to them, to treat the plaintiffs as "stockholders. It is an elementary principle that time does not "begin to run until there is a complete cause of action, and "there was no complete cause of action in this case until such "refusal. In *Davis* v. *Bank of England*[52] there is a judgment "of Best C.J. in which the question of the Statute of Limita-"tions in a similar case is considered." He then goes on to read the passage I have cited from Best C.J. in that case and cites also *Coles'* case[53] and *Sloman's* case.[54]

For the defendant bank it was argued that this case ought not to be followed because the partnership analogy mentioned by Kay J. is not a true analogy. I was referred by Mr. Caplan, who argued this part of the case, to a decision of Sir Robert Romer in *In re Severn and Wye and Severn Bridge Railway Co.*[55] The headnote there reads: "When a company declares a "dividend on its shares, a debt immediately becomes payable to "each shareholder in respect of his dividend for which he can "sue at law, and the Statute of Limitations immediately begins "to run. The declaration does not make the company a trustee "of the dividend for the shareholder, and an entry of the liability "in the company's books—at any rate when no special part of

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[52] 2 Bing. 393.

[53] 10 A. & E. 437, 449.

[54] 14 Sim. 475, 486.

[55] [1896] 1 Ch. 559; 12 T.L.R. 262.

"its assets is set aside as representing the dividend and no notice "of the entry is given to the shareholder—does not take the case "out of the statute."

Sir Robert Romer says[56]: "The liquidators have raised, "as they were entitled to do, the defence of the Statute of "Limitations in answer to the claims for unpaid dividends, which "I have to consider. That defence is, in my opinion, fatal "to the claims. The dividends in question were declared and "became payable more than twenty years before the present "claims were made, and constituted debts due to the share-"holders for which they could have sued at law, as was pointed "out by Lindley L.J. in the passage in his treatise on Company "Law (p. 437), which was cited in the argument before me. "Presumably, therefore, the Statute of Limitations began to "run in favour of the company from the time the dividends "became payable." Then he takes the objections made by the claimants and says this[56]: "In the next place, the claimants "contend that the statute did not run, on the ground that the "shareholders and the company were in the position of partners, "or in an analogous position. In my opinion that contention is "untenable. Nor can I see that the reasons upon which the rule "is founded, that the Statute of Limitations does not run in "respect of a claim between partners during the continuance of "the partnership, apply to a claim for unpaid dividends between "a shareholder of an incorporated company and the company. "The case of *Penny* v. *Pickwick*,[57] relied on by the claimants, "was one of a simple partnership which Lord (then Sir John) "Romilly held under the circumstances was a continuing "partnership. In the case of *Barton* v. *North Staffordshire* "*Railway Co.*[58] Kay L.J. (then Kay J.) decided that where "persons entitled as stockholders in a railway company were "suing to establish their position as such, their cause of action "only arose when the company first refused to treat them as "stockholders, and that the Statute of Limitations did not "commence to run before that refusal. He did not say that "the case was, in fact, analogous to a claim between partners, "but only that, if the analogy were applicable, it would support "his view, because the statute only runs against a partner from "the time of his exclusion."

It is said that this shows a disapproval of the decision of Kay J., or at any rate the grounds of it, which I ought not to follow, but this I do not accept. Moreover, the passage I have read from the judgment of Best C.J. in *Davis* v. *Bank of England*[59] supports the view that the statute does not run until the later date. Both in that case and in *Sloman's* case[60] and in Sir John Romilly's decision in *Taylor* v. *Midland Railway Co.*,[61] the ratio decidendi was that a forged transfer is a mere nullity having no effect on the true owner who still has the property in the stock. If this be the true view the statute cannot run.

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[56] [1896] 1 Ch. 564.

[57] (1852) 16 Beav. 246.

[58] 38 Ch.D. 458.

Similar considerations apply, in my judgment, to section 2 of the statute so as to prevent it from being a bar in respect of the second transaction in which the removal of the plaintiff's name was done more than six years before the writ was issued.

A further point discussed on this part of the case was whether the default in not keeping the register properly was a continuing default on the bank's part so that the proviso to section 21 applied and the Statute had no application at all. Having regard to the decision I have reached I need not further pursue this question.

The result is that in the action the plaintiff is, in my judgment, entitled to an order on the bank to procure her name to be entered in the books as the owner of £5,502 4 per cent. Consols, and in addition to such dividends as have been lost to her by the default of the bank in acting on the forged transfers in the three transactions making up this sum. In my judgment the statute does not run against this latter right either.

So far as the plaintiff has disentitled herself to her rights in respect of the remaining £4,500 stock in dispute, I am of opinion that her right to dividends has similarly gone, for the payment of these dividends to the transferees has been brought about by her own default and she cannot be heard to complain.

On subsequent days argument was heard on the question of costs: (1) as between the plaintiff and the defendants; (2) as between the defendants and the third parties; (3) as to the respective liabilities of the third, fourth and fifth parties.

In addition to counsel appearing in the action: *S. W. Templeman* appeared on the question of costs for the fifth party, and *Leonard Lewis* and *Harold Brown* for fourth parties.

The argument on costs appears sufficiently from the judgments; the following cases were cited in argument in addition to those mentioned in the judgments: *Blore* v. *Ashby* [1]; *Dansk Rekylriffel Syndikat Aktieselskap* v. *Snell* [2]; *Dicks* v. *Yates* [3]; *Gibbs* v. *Gibbs* [4]; *Medway Oil and Storage Co. Ld.* v. *Continental Contractors* [5]; *Ritter* v. *Godfrey.*[6]

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[59] 2 Bing. 393.

[60] 14 Sim. 475.

[61] 28 Beav. 287.

March 4. HARMAN J. In this action the plaintiff rested her case on the fact that the bank had passed a number of forgeries. That was put in issue and contested until the third day, when all the alleged forgeries were agreed to be forgeries. It seems to me that that is enough to carry the general costs of the action in the plaintiff's favour. The bank, conceding that issue (on which the evidence was mostly called) set up a number of other defences. One line of defence, namely, ratification or the receipt or supposed receipt by the plaintiff of the proceeds of the fraud, succeeded, in transactions amounting to rather less than half the total amount claimed. A number of other defences failed, notably the defence under the Limitation Act; because, although I held that the bank was entitled to the protection of the Public Authorities Protection Act, 1893, I held also that the Limitation Act did not run, and that that plea, therefore, was wrongly added by amendment at the end. I think that the strict order, therefore, would be that the plaintiff should have her costs of the suit except so far as increased by the claims for the several transactions on which she did not succeed. What the result of that would be I do not know, but I do not think that would be a convenient order to make. For one thing, it would involve two taxations, because it would involve taxing the costs incurred in respect of those four transactions, not of the plaintiff, but of the defendant, and taxing them, moreover, on a solicitor and client instead of a party and party basis having regard to the bank's rights as a public authority, and the whole thing would become more and more involved. I think that the modern practice was stated by Lord Goddard in *Cinema Press Ld.* v. *Pictures & Pleasures Ld.*,[7] where, at the end of his judgment, he says [8]: ". . . we "would add that the simplest way is to award costs in such "proportions as the judge thinks fair." That is what I propose to do, to order that the plaintiff's costs of the suit should be taxed as between party and party, and that when they are taxed the defendants should pay four-fifths of them.

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[1] (1889) 42 Ch.D. 682.
[2] [1908] 2 Ch. 127.
[3] (1881) 18 Ch.D. 76.
[4] [1952] P. 332; [1952] 1 T.L.R. 1143; [1952] 1 All E.R. 942.
[5] [1929] A.C. 88; 45 T.L.R. 20.
[6] [1920] 2 K.B. 47; 36 T.L.R. 144.
[7] [1945] K.B. 356; 61 T.L.R. 282; [1945] 1 All E.R. 440.
[8] [1945] K.B. 356, 364.

March 7. HARMAN J. The plaintiff has succeeded against the defendants to a degree which I have held entitles her to four-fifths of her costs. The defendants brought in five separate parties as third parties, alleging the same case against each of them, namely, that in respect of the particular transaction in which they were respectively concerned, each of them individually had presented transfers to the defendants which were forged, and claiming accordingly that the presentation by a broker or jobber of a forged transfer to the bank imported an implied liability in respect of all costs, charges, and expenses which the bank might suffer as a result of acting on that transfer.

That is the position having regard to the decision of the House of Lords in *Sheffield Corporation* v. *Barclay*,[3] where Lord Halsbury L.C., citing Mr. Cave in *Dugdale* v. *Lovering*,[4] said[5]: " 'It is a general principle of law when an act is done " 'by one person at the request of another which act is not in " 'itself manifestly tortious to the knowledge of the person " 'doing it, and such act turns out to be injurious to the rights " 'of a third party, the person doing it is entitled to an indem- " 'nity from him who requested that it should be done.' " Therefore the bank is entitled to an indemnity against the jobber who requested that they should register the transfer.

Lord Davey said[6]: " . . . there is implied by law a contract "by the person making the request to keep indemnified the "person having the duty against any liability which may result "from such exercise of the supposed duty." Lastly, at the end of his speech, he described the indemnity as being[7] "against "any loss resulting to them from the transaction."

Therefore, for such damages as flow from the transaction of registering each forged transfer, the bank is entitled to an indemnity.

That was contested by the third parties, four out of five of whom severally put in defences denying that the transfers were forged, and denying that, even if they were forged, they were bound to indemnify the bank.

When the action came on for trial, it was evident at an early stage that the issue was, first, the question of forgery and, secondly, the question whether any negligence or ratification by the plaintiff disentitled her to relief; and it was also evident that the third parties were vitally interested in both questions, because in fact they intimated that, when it came to third party proceedings, they would have nothing more to say. They agreed that *Sheffield Corporation* v. *Barclay*[8] made it inevitable that they should give an indemnity.

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[3] [1905] A.C. 392; 21 T.L.R. 642.

[4] (1875) L.R. 10 C.P. 196.

[5] [1905] A.C. 397.

[6] Ibid. 399.

[7] Ibid. 405.

The bank fought the case in the interests of all the third parties; in the case of three of them with success, and in the case of two of them the defences failed. But in the case of all of them the primary defence, namely, forgery, failed; and in the case of all of them the defence raised under the Limitation Act also failed. It is because, coming to equity, the plaintiff has, as I held, to submit to equitable principles that she failed in respect of four of the seven transactions.

It is admitted that the parties responsible for these transactions in which the plaintiff succeeds, must indemnify the bank against the cost of replacing £3,500 worth of stock in the one case and £2,000 worth of stock in the other, and the dividends appropriate to those two cases. About that there is no dispute.

There arises then the much-vexed question of the four-fifths of the plaintiff's costs which the defendants have been ordered to pay. I think that it is not disputed that the two third parties who have failed are under some liability in that respect. But it is said that the three other third parties were successful; so they were in the sense that the transfers which they lodged cannot be set aside and stand in spite of the fact they originated in fraud. They say therefore: no indemnity.

I do not think that that is right, because, unless the defendants had fought to the end, it may well have been that the action would not have resulted as it has. But, apart from that, they did deny, at any rate right up to the hearing, that they were bound to give any indemnity at all, whatever the result of the suit; and the bank was therefore bound to fight the action, not only to protect itself but also to justify its claim to indemnity. It seems to me on the whole that the costs which the defendants have been bound to incur vis-à-vis the plaintiff in fighting the main battle must be paid by the third parties.

It was then argued that it should be limited, as there might have been five or seven different actions, and nobody ought to have to pay more than he would have paid if his action had been a separate one. There is a great deal of justice in that; and the way in which I can deal with it will be made more simple when I go one step further.

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[8] [1905] A.C. 392.

So far as the four-fifths of the costs of the plaintiff against the defendants are concerned, the three parties whose transfers have not been disturbed cannot be asked to pay any part of that. The liability for those costs must fall on the two third parties who are liable, and the question is whether those costs ought to fall on them equally or in proportion to the amount involved, or how otherwise.

It seems to me that the right order to make on those costs is that the plaintiff's taxed costs paid by the defendants be recouped by those two third parties to the defendants; that is to say, they will be jointly and severally liable for that four-fifths of the plaintiff's costs when they are taxed.

That leaves the defendants' own costs of the action. It seems to me that the third parties are liable for them, subject only to the limitation that they ought not to be liable for more than if the action had been brought against them severally. A rough-and-ready way of dealing with those costs is to divide them into five and to order the four third parties here each to pay one-fifth of the defendants' costs.

The next question is the scale of those costs. The defendants say: "This is an indemnity case. Therefore we are entitled to "costs on an indemnity basis." That does not seem to have been the practice in third party proceedings. In such proceedings the practice seems to have been to treat costs for which a third party is liable to indemnify as being solicitor and client costs; see Seton (7th ed., vol. 3, p. 2072), and I propose to follow that practice.

Therefore the defendants' costs of the action will be taxed as between solicitor and client, and the four third parties will each be ordered to pay one-fifth of them.

I am leaving out Jobsons, the fifth of the third parties, because they were in a different position. They did not deny either that the document with which they were concerned had been a forgery, or that they were bound to indemnify the defendants. They have not for equitable reasons been bound to pay anything, because for the reasons which I have stated the bank was not liable to the plaintiff in this transaction. I shall not therefore order them to pay any part of the costs of the defendants.

There then remain the costs of the third party proceedings themselves. In my judgment, those were justified. Mr. Caplan urged me to say that the third parties who were, as he said, successful (that is to say, those who did not have to pay anything on the substantive part of the indemnity) should not have to pay any costs. But it is not right to treat them as successful; they neither admitted that they were bound to indemnify, nor did they admit the fact of the forgery, but in the result they admitted both, although it took at least part of the hearing to make them do so. They also pleaded the Limitation Act, and obliged the bank to take that point; and that, too, failed. The defendants succeed in their third party proceedings not only against those from whom they get substantive sums of money for the stocks, but also against those by whom they are entitled to be indemnified against their own costs. Therefore I see no reason why the third parties, and all of them, should not pay the defendants' costs of the third party proceedings, to be taxed as between party and party. However, in the case of Jobsons, who did not defend, their liability will be limited to such costs as they would have had to pay on a motion for judgment in default of defence. Subject to that, the party and party costs of the third party proceedings are, in my judgment, payable by the third parties, jointly and severally.

His Lordship further ordered that the four third parties were entitled to be indemnified by the fourth parties pro tanto in respect of their liabilities as to costs and the replacement of stock and payment of dividends; and that the fourth parties were similarly entitled to be indemnified by the fifth party.

Solicitors: *Bower, Cotton & Bower; Freshfields; J. G. Bosman, Robinson & Co.; Chamberlain & Co.*

I. G. R. M.

1955
Apr. 26, 27.

Upjohn J.

SILSBY *v.* HOLLIMAN AND ANOTHER.

[1954 M. 2460.]

Mortgage — Redemption and foreclosure — Mortgagee in possession — Assignment of mortgage to statutory tenant — Continued tender of rent — Proceedings by statutory tenant against mortgagor —Whether plaintiff in possession as statutory tenant or as mortgagee—Foreclosure or sale—Whether tenancy merged in mortgage.

Landlord and Tenant—Rent restriction—Statutory tenant—Merger.

In 1904 P. mortgaged a house to the trustees of O. The mortgage deed excluded the right of the mortgagor to grant leases of the mortgaged property. In 1943 P. granted a weekly tenancy of the property to S. In August, 1948, P. served a notice to quit on S., who remained in occupation under the protection of the Rent Acts. In 1953, P. died. After his death no interest was paid by his executors in respect of the mortgage, the estate being insolvent. In July, 1954, the mortgagees took out an originating summons against P.'s executors and S. asking for repayment of capital and interest and possession of the premises. In December, 1954, S., in order to remain in occupation of the premises, paid off the mortgagees and took a transfer of the mortgage from them. He remained in possession and tendered the weekly rent, which the executors refused to accept. S. who had been substituted as the plaintiff to the summons sought foreclosure of the mortgaged property. The defendant executors asked that there be a sale in lieu of foreclosure, contending that S., by reason of the transfer of the mortgage to himself, was no longer in possession as statutory tenant but as mortgagee; so that a sale would be with vacant possession. A sale subject to the rights of S. as statutory tenant would have been insufficient to discharge the mortgage debt:—

Held, making an order for foreclosure, that the plaintiff's right to go into possession as mortgagee if he so chose did not exclude him from the right to remain in possession under the Rent Acts, so that a sale could be effected subject only to that right; and that in the circumstances it would be inequitable to order a sale.

ADJOURNED SUMMONS.

By a mortgage dated November 14, 1904, and made between Joseph Charles Pearce (the mortgagor) of the one part and the then trustees of the Loyal Providential and Humane Lodge (No. 1448) of the Portsmouth District of the Independent Order of Oddfellows Manchester Unity Friendly Society of the other part, the mortgagor conveyed to the trustees the property known as No. 124, Manners Road, Southsea, Portsmouth, by way of mortgage to secure repayment to the trustees of £350 and interest. The mortgage excluded the right of the mortgagor to grant leases of the mortgaged property.

On July 23, 1943, the mortgagor granted to the plaintiff, Arthur James Silsby, a weekly tenancy of the mortgaged property at a rent of 19s. a week.

By a further charge dated July 10, 1945, and made between the mortgagor of the one part and the then trustees of the said lodge of the other part, and expressed to be supplemental to the mortgage of November 14, 1904, the mortgagor covenanted to repay the sum of £75 advanced to him out of the funds of the society, together with interest thereon.

On August 24, 1948, the mortgagor, as landlord, served a notice to quit the mortgaged property on the plaintiff. Thereafter, the plaintiff remained upon the premises as a statutory tenant under the Rent Restrictions Acts, paying a sum of 19s. a week. On October 18, 1953, the mortgagor died. During his lifetime the mortgagor had repaid £25 of the capital sum secured and had paid interest down to a period shortly before his death, but no interest had been paid by his personal representatives, the defendants, in respect of any period since his death, as his estate was insolvent.

On July 6, 1954, the present trustees of the lodge issued an originating summons against the defendants and the plaintiff, in which they asked for (1) payment of all moneys due under the covenants for payments contained in the mortgage dated November 14, 1904, and the further charge dated July 10, 1945; (2) possession of the mortgaged premises.

Evidence was filed on both sides and on November 18, 1954, the matter came before the master, who was informed by those representing the defendants that they could not any further resist the trustees' claim, and that the estate of the deceased mortgagor was insolvent.

By a deed of transfer of mortgage dated December 22, 1954, and made between the trustees of the said lodge of the one part and the plaintiff of the other part, it was witnessed that in consideration of the sum of £423 14s. 4d., being the aggregate of the respective amounts of mortgage money and interest then owing in respect of the mortgage and further charge the subject of the action, the trustees as mortgagees thereby conveyed and transferred to the plaintiff the benefit of the mortgage and further charge and the benefit of their rights in the action. By a letter dated January 11, 1955, the plaintiff's solicitors informed the

1955

SILSBY
v.
HOLLIMAN.

defendants' solicitors of the transfer of the mortgage and further charge to the plaintiff. As from January 24, 1955, the rent tendered by the plaintiff for his occupation of the mortgaged premises was refused by the defendants.

The plaintiff obtained leave of the court to amend the originating summons by permitting his name to be struck out as a defendant and added as plaintiff, and by adding a claim for foreclosure.

A. C. Sparrow for the plaintiff. Foreclosure of the mortgaged premises is sought. The defendants contend that by virtue of the deed of transfer of December 22, 1954, the plaintiff must be treated as a mortgagee in possession and that, accordingly, the court in exercise of its discretion should order a sale with vacant possession in lieu of foreclosure. The plaintiff, however, is not in possession as mortgagee but is in occupation as a tenant protected by the Rent Acts. Accordingly, a sale would have to take place on the basis that the purchaser took the property subject to the rights of a sitting tenant to remain in occupation. In those circumstances it is agreed that the proceeds of the sale would be insufficient to discharge the mortgage debt. On the question whether the plaintiff must be deemed to be a mortgagee in possession, see *Vacuum Oil Co. Ld.* v. *Ellis.*[1] A tenant who becomes a mortgagee in respect of the premises of which he is tenant does not necessarily thereby become mortgagee in possession: *Page* v. *Linwood.*[2]

It seems plain from *Tarn* v. *Turner*[3] that a tenant will not be placed in an unfavourable position by virtue of the fact that he takes an assignment of the mortgage in order to protect his interest to remain in possession. In that case it was held that the tenant was entitled to redeem the mortgage, the mortgagor having granted a tenancy contrary to the terms of the mortgage and the mortgagee refusing to accept rent from the tenant.

John Vinelott (*J. A. Wolfe* with him) for the defendants. It is conceded that if the tenancy of 1943 was still subsisting as between the plaintiff and the defendants when the plaintiff took the transfer of the mortgage in December, 1954, the question whether the tenancy had merged in the greater estate arising in the plaintiff by virtue of the assignment of the mortgage to him would be one of intention, and upon the evidence it is conceded that there would be no such merger. In December, 1954, however, the plaintiff was not a contractual tenant. The contractual tenancy was determined by the notice to quit of August 24, 1948, and thereafter the plaintiff had no estate in law at all; he had a personal right to remain in occupation which was good as against the mortgagor or a trespasser. But this right gave him no legal interest in the property. The original tenancy granted in 1943 was contrary to the terms of the mortgage deed and was not binding on the mortgagees. Upon the plaintiff taking a transfer of the mortgage in December, 1954, he became entitled to possession of the property, and accordingly he is a mortgagee in possession.

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[1] [1914] 1 K.B. 693, 698, 706.

[2] (1837) 4 Cl. & Fin. 399, 432.

[3] (1888) 39 Ch.D. 456, 470.

As to the position of a tenant of property within the Rent Acts after the contractual tenancy has been determined, see Megarry on the Rent Acts, 7th ed., p. 194, s. 2. The statutory tenant has no estate in the land and consequently there can be no question of the merger of his "estate" with an estate acquired after transfer of the mortgage to himself. After the transfer he has an estate as mortgagee and, accordingly, upon going into possession he must go into possession as mortgagee.

The plaintiff's position is analogous to that of a licensee who subsequently acquires some estate in the land. In such a case the licence automatically disappears by virtue of the higher right to possession given by the acquisition of the estate.

The plaintiff, as submitted, is a mortgagee in possession, and the court, in the exercise of its discretion, should order a sale, which, being on the footing that the property would be sold with vacant possession, would realize sufficient to pay off the mortgage debt and leave a surplus for the benefit of the mortgagor's estate.

Sparrow in reply. Whether the plaintiff has or has not an estate in the land is irrelevant, for what he must have in order to succeed is a right to possession. He has two such rights: (1) a right to possession of the premises under the Rent Acts; (2) a right to go into possession as mortgagee. He has never exercised the latter right.

UPJOHN J. This summons raises a short but interesting point as between mortgagor and mortgagee. [His Lordship stated the facts and continued:] The plaintiff continued paying rent until January 11, 1955, but after that date tender of the rent was refused for the reason that the defendant executors claimed that he was no longer a statutory tenant but that he was in possession by virtue of his being mortgagee and, therefore, that he was the mortgagee in possession. Indeed, that is the principal issue which I have to try.

The original mortgagees having been paid off, they disappear from the picture. The matter comes before me in this way. Mr. Silsby has been struck out as a defendant and he is now the sole plaintiff, two executors of the mortgagor being the sole defendants. He now asks for foreclosure of the premises. On the other hand, the defendants ask that there be a sale in lieu of foreclosure.

There have been valuations made upon two bases. It is agreed that, if the sale is to be on the footing of vacant possession, the property should reach something between £1,150 and £1,175: that is to say, there would be ample to discharge the outstanding amounts due under the mortgage and the costs and leave a substantial surplus. Accordingly, if the plaintiff is to be treated as mortgagee in possession, the defendants have a strong case for urging upon me that in exercise of my discretion I should grant a sale rather than foreclosure. On the other hand, if the plaintiff is not to be treated as mortgagee in possession but can remain in possession relying on the protection afforded to him by the Rent Restrictions Acts, the sale will have to be on the footing that the property is sold subject to a sitting tenant at 19s. a week. It is then conceded that the amount which would be obtained for the property upon that footing would be insufficient to discharge the mortgage debt and the defendants could not properly in those circumstances ask for sale rather than for foreclosure.

The case is put in this way. It is conceded that if the tenancy created in 1943 was still subsisting as between the plaintiff and the defendants when the plaintiff took a transfer of the mortgage on December 22, 1954, the question whether the tenancy had merged in the greater estate which the plaintiff obtained by becoming a mortgagee would be one of intention, and upon the evidence in this case it is conceded that there would be no such merger. Therefore, the plaintiff would be entitled in these proceedings to say that he was still there as tenant and, accordingly, that any sale would have to be subject to that tenancy.

The point is put that in fact the plaintiff is no longer a contractual tenant but is merely a statutory tenant under the Rent Restrictions Acts. The defendants do not rely on merger because all that a person remaining in possession under the rights conferred upon him by the Rent Restrictions Acts has are the rights of what is commonly called a statutory tenant—he has in fact no estate in the land.

I have been referred to a passage in the 7th edition of Mr. Megarry's book on the Rent Acts which sets out what is the position of a statutory tenant. Section 2 on p. 194 is in these terms: " It has been said that ' the statutory tenant has no estate " ' or property as tenant at all, but has a purely personal right to " ' retain possession of the property.' The tenancy has been " called ' nothing more than a status of irremovability,' or ' a " ' permanency of tenure '; and it has been said that the tenant, " who has been described with some degree of vituperation, is " ' not a tenant at all in the sense that he has an estate. He " ' has . . . a merely personal right of occupation.' The convenient but inaccurate term ' statutory tenancy ' is thus a " misnomer; it is ' a somewhat inapposite expression, for it con" ' fers on the so-called statutory tenant no estate or interest in " ' the land,' and is merely ' a compendious expression to describe " ' the right of a tenant of protected premises to remain in posses" ' sion of those premises, notwithstanding the determination of " ' his contractual interest.' If a statutory tenant sues for pos" session of the premises, his claim is to the premises and not " merely to a statutory tenancy thereof." Most of that paragraph consists of extracts from a number of judgments. A little later on the author states: " These authorities and dicta, how" ever, do not completely cover the ground. Thus a statutory " tenant is able to take proceedings in trespass against his land" lord or any other interloper, and is not in the defenceless " position of a mere licensee; and in procedural matters he is " treated as a tenant. Indeed, he has been said to have a right " which avails against all the world, yet he appears to have been " unprotected against those claiming by title paramount if the " contractual tenancy out of which his statutory tenancy arose " would have afforded him no protection."

In those circumstances, it is submitted that when the plaintiff acquired his estate as mortgagee his right to possession under the Acts necessarily went. It is not a question of merger, for there is no estate to merge. But the lesser right, it is said, must necessarily go because he can rely upon his right to possession as mortgagee. It has been likened to the case of a licensee who subsequently acquires some estate in land, and it is said that the licence automatically must disappear because of the higher right to possession given by the acquisition of the estate.

It is pointed out with force that the acquisition of the mortgaged estate was for the very purpose of remaining in possession and protecting the plaintiff's occupation of these premises which

1955

SILSBY *v.* HOLLIMAN.

Upjohn J.

no doubt have come to be his home now for some 12 years. Therefore, it is said that the result must necessarily be that the plaintiff is now in occupation as mortgagee in possession and that therefore there should be a sale.

The point is a curious one, but, on the whole, I do not think that the plaintiff, as tenant, has lost his rights. He has a right to possession of the premises, a right afforded to him by the Rent Restrictions Acts so long as he goes on paying 19s. a week, and no case is made for ousting him under the provisions of those Acts. He also has a right to go into possession, if he so desires, as mortgagee in possession. No doubt he could, if he wished, have refused to go on paying rent to the defendants and then he would at once become accountable as mortgagee in possession. In my view, he has those two rights to possession and the law cannot treat him as having abandoned what for some purposes may be regarded as the lesser right, that is the right to remain in possession under the rights conferred by the Rent Restrictions Acts. In my judgment, those two rights are now subsisting and the plaintiff is in a position to come to this court and say: "I have the right today to remain paying a rent "of 19s. a week having regard to the Rent Restrictions Acts. "Therefore, if there is to be a sale, it must be upon that footing." In the circumstances, for the reasons I have explained earlier in my judgment, it would then plainly be inequitable to grant a sale. Accordingly, I must make an order for foreclosure.

Order accordingly.

Solicitors: *Arbeid & Co.; Simon, Haynes, Barlas & Cassels.*

J. A. G.

1955
June 14, 15, 21.

Vaisey J.

BULMER *v.* ATTORNEY-GENERAL.

[1954 B. 4372.]

Nationality—Naturalization—Local naturalization—Plaintiff's father naturalized in Burma—Status of plaintiff under Burma Independence Act—" British subject by naturalization "—Indian Naturalization Act (XXX of 1852)*—Burma Independence Act,* 1947 (11 *&* 12 *Geo.* 6, *c.* 3), *s.* 2 (1), *Sch. I, paras.* 1, 2 (2).

The plaintiff's father, who was a German by origin and who had for a long time been resident in Burma, was, in 1878, granted a local certificate of naturalization in Rangoon, applicable to the territories of the East India Company and issued under the provisions of the Indian Naturalization Act, 1852. In 1951 the plaintiff applied at the office of the British Consulate in Hamburg for the renewal of his passport, which was refused on the ground that, under the provisions of the Burma Independence Act, 1947, he was not a British subject, as his father was not "a British "subject by naturalization" within the meaning of those words in paragraph 2 (2) of Schedule I to the Act. In an action against the Attorney-General by the plaintiff claiming a declaration that on the true construction of the Act of 1947 he did not, by reason of its provisions, cease to be a British subject:—

Held, that the naturalization contemplated by the Act of 1947 was not confined to unlimited or "Imperial" naturalization; that the local naturalization of the plaintiff's father was within the terms of the Act; and that the plaintiff was accordingly entitled to the declaration sought.

Markwald v. *Attorney-General* [1920] 1 Ch. 348; 36 T.L.R. 197 distinguished.

ACTION.

The plaintiff, Walter Augustus Bulmer, was born in Rangoon, Burma, on August 9, 1883, and was immediately before January 4, 1948, a British subject. The plaintiff's father, Christian Gottfried Buhmeyer, who was a German subject by origin and who had long been resident in Burma, was, on May 21, 1878, granted a certificate of naturalization in Rangoon under the provisions of an Act for the Naturalization of Aliens (Act No. XXX of 1852) passed by the Governor-General of India in Council on July 16, 1852.

Section VIII of that Act provided that, on obtaining such certificate and taking and subscribing the prescribed oath, the person to whom such certificate was granted should within the territories under the government of the East India Company be deemed a natural born subject of Her Majesty as if he had been born within the said territories, and that he should be entitled within the said territories to all the rights, privileges and capacities of a subject of Her Majesty born within the said territories, except such rights, privileges and capacities as might be especially excepted in such certificate. The certificate contained no such exceptions and the plaintiff's father duly took and subscribed the prescribed oath.

On May 17, 1945, the plaintiff changed his name by deed poll from Walter Augustus Buhmeyer to Walter Augustus Bulmer.

In or about March, 1951, the plaintiff's application for the renewal of his passport was refused by the office of the British

Consulate in Hamburg, on the alleged ground that he was not "a British subject by naturalization" within the meaning of paragraph 2 (2) of Schedule I to the Burma Independence Act, 1947.[1] The plaintiff from time to time submitted to the Home Office his claim that he had remained a British subject, notwithstanding the said provisions of the Burma Independence Act, 1947, but the Home Office refused to recognize it.

In this action the plaintiff claimed a declaration that, on the true construction of the Act of 1947 and in the events which had happened, he did not cease to be a British subject by reason of the provisions of that Act.

F. W. Beney Q.C. and *Immanuel Goldsmith* for the plaintiff. That the plaintiff is a naturalized subject of the United Kingdom is clear from certain passages in the judgments in *Markwald* v. *Attorney-General.*[2] He was a naturalized British subject before the passing of the Act of 1947, and that statute did not have the effect of depriving him of that status. The rights of an individual are not to be regarded as taken away by Act of Parliament except by special words: *In re Boaler.*[3]

Milner Holland Q.C. and *Denys Buckley* for the Attorney-General. The Burma Act is an Imperial Act and a reference in it must refer to status in this country: see the observations of Lord Sterndale M.R. in *Markwald* v. *Attorney-General.*[4] The plaintiff in that case was an alien if he came to this country and, equally, the plaintiff's father was, in English law, an alien. It is absurd to say that someone who is declared by another State to be a British subject by naturalization is ipso facto a British subject by naturalization. Section 2 (1) (*a*) of the Burma Act shows that the statute affects everyone born in Burma. If the plaintiff's father had been born in Canada, the plaintiff would have been a British subject; his father was, however, a German, and in this country he would always have been a German. In *Markwald* v. *Attorney-General* [4] Lord Sterndale M.R. points out that the restriction indicated in section 8 of the Naturalization Act, 1870, shows that the Australian Government could not legislate for the whole Empire. The English law was totally unaffected by what the Burma Act said.

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[1] Burma Independence Act, 1947, s. 1: "(1) On the appointed day, "Burma shall become an independent "country, neither forming part of "His Majesty's dominions nor en-"titled to His Majesty's protection. "(2) In this Act, the expression 'the "'appointed day' means January 4, "1948."

S. 2: "(1) Subject to the provi-"sions of this section, the persons "specified in the First Schedule to "this Act, being British subjects im-"mediately before the appointed day, "shall on that day cease to be British "subjects. . . ."

Sch. 1, para. 1: "The persons "who, being British subjects immedi-"ately before the appointed day, are, "subject to the provisions of section 2 "of this Act, to cease on that day to "be British subjects are the following "persons, that is to say—(*a*) persons "who were born in Burma or whose "father or paternal grandfather was "born in Burma, not being persons "excepted by para. 2 of this Schedule "from the operation of this sub-"paragraph."

Para. 2 (2): "A person shall also "be deemed to be excepted from the "operation of the said paragraph "(*a*) if he or his father or his paternal "grandfather became a British sub-"ject by naturalization. . . ."

[2] [1920] 1 Ch. 348; 36 T.L.R. 197.

[3] [1915] 1 K.B. 21, 26, 34, 39.

[4] [1920] 1 Ch. 348, 360.

The phrase "British subject by naturalization" means the status of the subject in English law. That does not make him a British subject. [*Rex* v. *Francis*,[5] Halsbury's Statutes of England, 2nd ed., vol. 28, p. 159, and the British Nationality Act, 1948, s. 32 (6), were referred to.] The answer of the *Markwald* case [6] is that Markwald was an alien in this country and a British subject in Germany. The status of a British subject was considered by Vaisey J. in *Prince Ernest of Hanover* v. *Attorney-General.*[7] It involves allegiance. [Reference was made to Halsbury's Statutes of England, 2nd ed., vol. 1, p. 675.]

Beney Q.C. in reply. The words of section 8 of the Act of 1852 make the resultant certificate such that a person receiving it has the rights conferred by the Act of 1852. He must be deemed to be a British subject, and it cannot be said, "Here is "a person who is entitled to some of the rights of a British "subject." It is not right to say that the plaintiff had only such privileges as the Burma Act granted. In the eyes of British law this man was a British subject when this Act was passed. The court should, in construing paragraph 2 (2), imply the addition of the words "according to the Act of 1914" to the phrase "British subject by naturalization."

There are passages in the *Markwald* case [8] which support the view that a certificate granted in a Dominion sufficed to make a person a British subject there and not a British subject in the United Kingdom, where it was necessary for him to register. That proposition in no way decides the present case, because the question here is when this man's father became "a British

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[4] [1920] 1 Ch. 348, 360.

[5] [1918] 1 K.B. 617, 623; 34 T.L.R. 273.

[6] [1920] 1 Ch. 348.

[7] Ante, 440, 447; [1955] 1 All E.R. 746.

[8] [1920] 1 Ch. 348, 360, 367.

"subject by naturalization." [Reference was made to *Joyce* v. *Director of Public Prosecutions*.[9]]

This being an Act which involves an interpretation of rights must be construed strictly. It is the intention of Parliament that those rights should not be interfered with.

Cur. adv. vult.

June 21. VAISEY J. The plaintiff, Walter Augustus Bulmer, was born in Rangoon, Burma, on August 9, 1883. His surname was originally "Buhmeyer" but he changed it to "Bulmer" by a deed poll dated May 17, 1945. It is undisputed that he was, immediately before January 4, 1948, a British subject. His father, the late Christian Gottfried Buhmeyer, was German by origin but had long been resident in Burma. He was granted a certificate of naturalization in Rangoon on May 21, 1878, under the provisions of an Act called "An Act for the Naturalization "of Aliens" (No. XXX of 1852), passed by the Governor-General of India in Council on July 16, 1852. This Act (which I will call "the Act of 1852") recited that it was expedient to provide for the naturalization of aliens resident in the territories under the Government of the East India Company.

The plaintiff seeks a declaration that on the true construction of the Burma Independence Act, 1947 (to which I will refer as "the Act of 1947"), and in the events which have happened, he did not cease to be a British subject by reason of the provisions of the Act of 1947, and particularly section 1 (2) and section 2 (1) thereof, and paragraphs 1 (*a*) and 2 of Schedule I thereto. This enactment provided that persons born in Burma who were British subjects immediately before January 4, 1948, should cease to be British subjects on that date, but it provided also that any such person should be deemed to be excepted from the operation of that provision if, among other things, his father "became a British subject by naturalization." Those are the material words for the purposes of the present case. The defendant, the Attorney-General, suggested in the first place that, because the Act of 1947 was an Act of the Parliament of this country, any reference to naturalization contained in it should be read as meaning naturalization recognized for all purposes as effectual in this country. I find myself unable to accept that argument.

The Act of 1852 derived its authority by delegation from the

[9] [1946] A.C. 347, 362, 366; 62 T.L.R. 208; [1946] 1 All E.R. 186.

Act 3 & 4 Will. IV, c. 85, which received the Royal Assent and became law on August 28, 1833. See sections 43, 45 and 51. Section VIII of the Act of 1852 provides that on obtaining a certificate thereunder and taking and subscribing the oath thereinafter directed, the person to whom such certificate was granted should, within the territories therein referred to, be deemed a natural-born subject of the British Crown as if he had been born within the said territories, and should be entitled within the said territories to all the rights, privileges and capacities of such a subject born within the said territories except such rights, privileges and capacities as might be specially excepted in such a certificate. I cannot accept the argument that this was something short of actual naturalization and merely the conferring of the rights, privileges and capacities incident to naturalization, particularly in view of the recital in the Act of 1852 to which I have referred, and its title.

The certificate granted to the plaintiff's father purported to grant him all the rights, privileges and capacities of naturalization under the Act of 1852. It contained no exceptions, and the plaintiff's father in due course took and subscribed the oath as provided by the Act. This is admitted, though the actual date of his doing so is unknown. By that oath, the plaintiff's father swore to be faithful and bear due allegiance to the Sovereign of the United Kingdom and all "these territories dependent "thereon," and that he would be true and faithful to the East India Company. "These territories" and the territories referred to in section VIII are those which were under the government of the East India Company, and undoubtedly included Burma. I can and do hold that the plaintiff's father became a British subject by naturalization in Burma in or about the year 1878.

Now, at all material times from 1900 until the beginning of 1951, the plaintiff held a British passport, but when, in or about the month of March, 1951, he applied for a renewal of his passport, his application was refused on the ground that he was not entitled thereto, because his father never became a British subject by naturalization within the meaning of the Act of 1947, so that he, the plaintiff, had ceased to be a British subject on January 4, 1948.

Though it is not, in my judgment, material for the purposes of the present decision, I cannot in the circumstances refrain from alluding to the fact that the plaintiff had, at considerable personal risk, done good service to this country during the war by supplying information from Germany, where it seems that he was residing in a species of open arrest as a prisoner-of-war.

The point in the case is whether the plaintiff's father became a British subject by naturalization within the meaning of paragraph 2 (2) of Schedule I to the Act of 1947. The suggestion is that these words refer only to naturalization unlimited as to locality (what is apparently known as "Imperial" naturalization) and are not satisfied by the merely local naturalization which the plaintiff's father undoubtedly obtained in or about 1878. At first sight one would have thought that any naturalization would have been covered by the words in question—that is, "became a "British subject by naturalization"—but it is said that the case of *Markwald* v. *Attorney-General*[1] is an authority which requires me to decide otherwise.

The headnote to the report of that case reads as follows: "By article 51 of the Constitution scheduled to the Common-"wealth of Australia Constitution Act, 1900, the Commonwealth "Parliament was empowered to make laws (inter alia) with "respect to '(xix) Naturalization and aliens.' In pursuance of "those powers the Commonwealth Parliament passed the "Naturalization Act, 1903, which, by section 7, empowers the "Governor-General in Council to grant a certificate of naturaliza-"tion to an alien under certain conditions, provided that he shall "not issue such a certificate until he has received from the "applicant a certificate from one of the officers therein mentioned "that the applicant has before him taken an oath or affirmation "of allegiance in the form in the schedule to the Constitution. "By section 8 'A person to whom a certificate of naturalization "'is granted shall in the Commonwealth be entitled to all "'political and other rights powers and privileges and be subject "'to all obligations to which a natural-born British subject is "'entitled or subject in the Commonwealth.' A natural-born "German subject left Germany in 1878 and went to Australia, "where, in 1908, he took the oath of allegiance to His Majesty "and was granted under the powers of the Naturalization Act, "1903, a certificate of naturalization by which he became entitled "to all political and other rights, powers, and privileges to which "a natural-born British subject is entitled in the Commonwealth. "He subsequently became a resident in London and was charged "and convicted for that, being an alien, he had failed to furnish "to a registration officer the particulars required by the Aliens

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[1] [1920] 1 Ch. 348.

"Restriction (Consolidation) Order, 1916, and his conviction was "afterwards upheld by a Divisional Court: *Rex* v. *Francis.* "*Ex parte Markwald.*[2] In an action brought by the plaintiff "against the Attorney-General for a declaration that he was no "alien in England, but a liege subject of His Majesty the King, "and entitled to the protection of His Majesty the King in all "parts of His Majesty's Kingdom and Dominions:—*Held* (affirm-"ing the decision of Astbury J.), that neither the taking of the "oath of allegiance alone, nor the taking of the oath coupled with "the grant of the certificate in Australia, made the plaintiff a "British subject in the United Kingdom, and that he was, there-"fore, an alien when in the United Kingdom, and that the "declaration must be refused. Grounds of the judgments of the "Divisional Court in *Rex* v. *Francis, Ex parte Markwald*[2] "approved. *Calvin's Case*[3] distinguished." Then: "*Per* "Younger L.J., that the plaintiff was at least to this extent to "be regarded as an alien, that he was a person so described in "the British Nationality and Status of Aliens Act, 1914, and "for the purposes of that Act. He was a person entitled under "that Act to apply as an alien for and to have granted to him "in the United Kingdom a certificate of naturalization."

Now, it seems to me that all that was decided in *Markwald* v. *Attorney-General*[4] was that an alien locally naturalized did not cease to be and still remained an alien outside the locality. I do not doubt that the plaintiff's father, in all places other than those within the jurisdiction of the East India Company, was and continued to be an alien for all purposes, but it is equally clear to me that, within the limits of that jurisdiction, he was not an alien but a British subject, and a British subject by naturalization. If the question had been put to the plaintiff, "Did your father ever become a British subject by naturaliza-"tion?" he could truthfully have given an affirmative answer. If the question were put to him in Burma, I think that he would naturally have left the answer unqualified. If the question had been put to the plaintiff in, say, this country or in Australia, he would no doubt have had to explain that his father's status as a British subject was of a purely local character and possessed no validity outside India, including Burma. But I do not see how I can hold that the only kind of naturalization contemplated by the words of the Schedule was the so-called "Imperial"

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[2] [1918] 1 K.B. 617.

[3] (1608) 7 Co.Rep. 1a.

[4] [1920] 1 Ch. 348.

1955

BULMER v. ATTORNEY-GENERAL.

Vaisey J.

naturalization, that is to say, unlimited as to locality. I should have thought that, in an Act concerning Burma, naturalization in and quoad Burma was just the kind of naturalization most likely to have been in the contemplation of the legislature. But the words are perfectly general, and I do not see why they could not be satisfied by the father's naturalization acquired anywhere, e.g., in Australia or Canada, and not only if he had acquired it everywhere or, at any rate, had acquired it in and for Great Britain. No doubt, if the fact had been that the plaintiff's father was naturalized as a British subject in Canada or Australia, his case would have been much more difficult, because it might well have been argued that the legislature could not be supposed to have been considering a naturalization which was effectual neither in this country nor in Burma. In no case could the hypothetical question which I have propounded have been answered in the negative, the hypothetical question being, of course, "Did your father ever become a British subject by "naturalization?" I need say nothing about the nature and extent of the obligations to which the plaintiff's father was subject in respect of his allegiance both under and apart from his oath. Such questions as were considered in the case of *Joyce* v. *Director of Public Prosecutions*[5] do not, in my judgment, arise here. I need say nothing about them.

It seems to me that the plaintiff's application for renewal of his British passport ought to have been acceded to, and I will declare that, on the true construction of the Act of 1947 and in the events which have happened, the plaintiff did not cease to be a British subject under the provisions of that Act, and that he is now a British subject.

Declaration accordingly.

Solicitors: *Cardew-Smith & Ross; Treasury Solicitor.*

J. L. D.

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[5] [1946] A.C. 347.

MERRICKS *v.* HEATHCOAT-AMORY AND THE MINISTER OF AGRICULTURE, FISHERIES AND FOOD.

1955
May 3.

Upjohn J.

[1955 M. No. 413.]

Crown Proceedings—Proceedings against Crown—Injunction—Minister—Application for mandatory injunction against Minister—To withdraw draft scheme from Parliament—Minister acting as representative of the Crown—Injunction not maintainable—Agricultural Marketing Act, 1931 (21 *&* 22 *Geo.* 5, *c.* 42), *s.* 1 (8)—*Crown Proceedings Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 44), *ss.* 2, 17, 21.
Parliament—Privilege—Right to control own proceedings.

The plaintiff moved for a mandatory injunction against D. H.-A. and the Minister of Agriculture, Fisheries and Food (the same individual) that they should withdraw the draft of a scheme entitled " Scheme under the Agricultural Marketing Acts, 1931 to "1949, regulating the marketing of potatoes," laid before each House of Parliament on April 6, 1955, by the first defendant purporting to act in his capacity as the second defendant, and that they be restrained from seeking approval of the scheme by each House of Parliament and from making an order under section 1 (8) of the Act of 1931 approving the scheme on the ground that the draft scheme was ultra vires the powers of the Minister under the Act.

It was conceded by the plaintiff that if the Minister were acting as a representative of the Crown an injunction could not be granted having regard to section 2 of the Crown Proceedings Act, 1947; but it was contended that he was not so acting but as a person designated by section 1 of the Act of 1931 to perform these duties, or alternatively, in a purely individual capacity:—

Held, that the Minister in carrying out or proposing to carry out his functions under section 1 of the Act of 1931 and in dealing with the scheme was acting as a representative or officer of the Crown, so that an injunction would not lie.

Harper v. *Secretary of State for the Home Department*, ante, 238; [1955] 2 W.L.R. 316; [1955] 1 All E.R. 331 considered.

MOTION.

Under the powers conferred by the Agricultural Marketing Acts, 1931 and 1933, a scheme for the marketing of potatoes was approved by both Houses of Parliament and brought into force by an order dated December 20, 1933, entitled The Potato Marketing Scheme (Approval) Order, 1933 (S.R. & O. 1933, No. 1186). The Potato Marketing Board was constituted under that order to administer the scheme. Recently the Board had decided to propound a substitutional scheme entitled " Scheme under the " Agricultural Marketing Acts, 1931 to 1949, regulating the "marketing of potatoes," to which section 1 of the Agricultural Marketing Act, 1931,[1] was applicable, save that the Minister did not need to consult the Board of Trade under section 1 (8) of that Act.

The substitutional scheme was propounded in July, 1954, and objection to it was taken by a number of persons. The Minister of Agriculture, Fisheries and Food ordered an inquiry to be held, which was concluded on January 12, 1955, and a report was made to him. The draft scheme was approved by the Minister, who laid it before each House of Parliament on April 6, 1955.

The plaintiff issued a writ on April 29, 1955, claiming to prevent the Minister from proceeding with the substitutional scheme. The defendants were Derek Heathcoat-Amory (the Minister of Agriculture, Fisheries and Food) sued personally, and Minister of Agriculture, Fisheries and Food sued as a corporation sole; the Minister being so constituted under section 1

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[1] Agricultural Marketing Act, 1931, s. 1 (1): "A scheme regulating "the marketing of an agricultural "product by the producers thereof "may be submitted to the Minister "in accordance with Part I of the "First Schedule to this Act, and the "Minister may, subject to the provi- "sions of this section, approve the "scheme."

Subs. (3): "Before approving a "scheme, the Minister shall cause to "be published . . . notice of the sub- "mission of the scheme . . ."

Subs. (4): "Every objection must "be sent to the Minister in writing "and must state the grounds of "objection and the specific modifica- "tions required."

Subs. (5): "The Minister, after "considering any scheme duly sub- "mitted to him and any objections "and representations duly made with "respect thereto and after holding "such inquiries (if any) as he thinks "fit, may make such modifications "in the scheme as he thinks proper ". . ."

Subs. (6): "Any inquiry under "this section shall be held in accord- "ance with rules made by the "Minister for the purpose by a com- "petent and impartial person ap- "pointed by the Minister, and those "rules may contain provisions as to "the costs of the inquiry, and such "expenses of any such inquiry as "may be incurred by the Minister "with the approval of the Treasury "shall be defrayed out of moneys "provided by Parliament."

Subs. (8): "If the Minister, after "making such modifications (if any) "as aforesaid, is satisfied that the "scheme will conduce to the more "efficient production and marketing "of the regulated product, he may, "after consultation with the Board of "Trade, lay before each House of "Parliament a draft of the scheme, "and if each House resolves that "the scheme shall be approved, the "Minister shall make an order ap- "proving the scheme in terms of the "draft, and the scheme shall (subject "to the provisions of this Act) come "into force on such date after the "date of the passing of the last of "such resolutions of approval as may "be specified in the order, and the "making of the order shall be con- "clusive evidence that the require- "ments of this Act have been com- "plied with and that the order and "the scheme approved thereby have "been duly made and approved and "are within the powers conferred by "this Act."

(2) of the Ministry of Agriculture and Fisheries Act, 1919, which set up the Ministry.

By this motion the plaintiff asked " that the defendants and " each of them may:

" 1. Be ordered to withdraw the draft of a scheme entitled " ' Scheme under the Agricultural Marketing Acts, 1931 to 1949, " ' regulating the marketing of potatoes ' and laid before each " House of Parliament on April 6, 1955, by the first defendant " purporting to act in his capacity as Minister of Agriculture, " Fisheries and Food, from each House of Parliament;

" 2. Be restrained from seeking approval of the said scheme " by either House of Parliament and from making an order " under section 1 (8) of the Agricultural Marketing Act, 1931, " approving the said scheme."

A preliminary point was raised by the defendants that the proceedings were misconceived.

Sir Reginald Manningham-Buller A.-G., Q.C., Sir Harry Hylton-Foster S.-G., Q.C. and *W. F. Waite* for the defendants. If the defendants succeed on this preliminary point there will be no need to go into the merits of the case. These proceedings are entirely misconceived even if the proposed scheme were ultra vires, which is not admitted.

In so far as these are proceedings against a Minister of the Crown, there is no jurisdiction to grant an injunction. In so far as they purport to be proceedings against the Minister in his personal capacity: (1) he could not, and did not, purport to lay this scheme in his personal capacity; (2) if that be wrong, and he did act in a personal capacity, he owed no duty to, and infringed no rights of, the plaintiff; and (3) if he acted in a personal capacity, so far as the House of Commons was concerned he acted as a Member of Parliament, since a member of the public cannot lay a scheme before the House of Commons; and so far as the House of Lords was concerned he could only act in his position as a Minister of the Crown.

The injunctions sought on this motion seek to enjoin him to follow a certain course of action in Parliament, namely, to withdraw the draft scheme laid before the House of Commons, and to refrain from moving the House of Commons to approve the scheme. The court is being asked to affect the conduct of a Member of Parliament in Parliament. Attempting to influence the conduct of a Member of Parliament in Parliament is clearly a breach of the privilege of Parliament and punishable as a contempt.

If the Minister was acting in a personal capacity, he was none the less acting as a Member of Parliament and these injunctions seek to interfere with his duties as a member: see Sir T. Erskine May's Parliamentary Practice, 15th ed., pp. 123, 152, 159 and 160; and *Bradlaugh* v. *Gossett.*[2]

There is no precedent for this type of proceedings. There are cases where the courts have rightly interfered before a scheme was laid before Parliament. In *Harper* v. *Secretary of State for the Home Department*[3] an attempt was made to prevent the Home Secretary from submitting a draft Order in Council to Her Majesty in Council when it had already been approved by both Houses of Parliament. The court is being asked here to take steps to prevent Parliament from considering a scheme which was laid before it on April 6, 1955. To do so may amount to a breach of privilege; it is many years now since Parliament and the courts have been in conflict, and the jurisdiction of the House of Commons over its own proceedings is exclusive: *Stockdale* v. *Hansard.*[4] The motion raises serious constitutional issues. Moreover, if injunctions were granted there would be no means of enforcing them.

Before the Crown Proceedings Act, 1947, a Minister could not be sued in respect of what he did or purported to do as a Minister of the Crown: *Hutton* v. *Secretary of State for War.*[5] Section 1 of the Act gives the right to sue the Crown, but the Agricultural Marketing Act, 1931, under which this scheme was laid, gives no individual any right of enforcement by proceedings, and a petition of right could not, before the Act, have been brought in those circumstances. Section 1 of the Act of 1947 does not operate in this case to confer on the plaintiff a right of suing the Crown or a Minister. [Sections 2, 17, 21 and 35 of the Crown Proceedings Act, 1947, were referred to.] The Act does not help the plaintiff at all.

Alternatively, if the Crown Proceedings Act could apply, the proceedings must be against the Ministry, not the Minister; or against the Attorney-General.

[UPJOHN J. You draw a distinction between the Ministry and the Minister?]

Yes, if the proceedings were against the Minister, *Hutton's* case [5] would have applied, if they were against the Ministry, section 21 would have applied.

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[2] (1884) 12 Q.B.D. 271.

[3] Ante, 238; [1955] 2 W.L.R. 316; [1955] 1 All E.R. 331.

[4] (1839) 9 Ad. & El. 1.

[5] (1926) 43 T.L.R. 106.

The scheme was not laid by the Minister in his personal capacity but in that of Minister, but whether the scheme was intra or ultra vires does not affect the capacity in which he laid it before Parliament. The court is in no way bound to follow the dictum of Roxburgh J. on the ex parte application in *Harper's* case,[6] that a Minister in submitting a draft order to Her Majesty in Council was not acting in his general capacity as Minister, but as a person to whom the duty was expressly delegated by the Act. Moreover, Harman J., in *Hammersmith Borough Council* v. *Boundary Commission for England*,[7] took a different view. The laying of the scheme before Parliament did not infringe the rights of any citizen; the scheme if approved might affect the rights of citizens, but relief is sought only in respect of the laying of the scheme. The Act of 1931, however, imposed no duty on the plaintiff in respect of laying this scheme. [Reference was made to *Reg.* v. *Lords Commissioners of the Treasury*.[8]]

Once a scheme is approved by both Houses, the Minister's duty under section 1 (8) of the Act of 1931 is mandatory, as it was in *Harper's* case,[9] and the words of the Master of the Rolls in that case are applicable here.

Derek Walker-Smith Q.C. and *Ian Percival* for the plaintiff. To restrain a person from seeking the approval of Parliament, or either House thereof, of a defective scheme, ultra vires the enabling Act, is not to trespass upon or derogate from the sovereignty of Parliament or the right of Parliament to control its own proceedings. In relieving Parliament from the risk of having presented to it for approval by resolution a scheme which is ultra vires, the interference of the court renders a service not only to the parties but to Parliament: *Rex* v. *Electricity Commissioners*.[10] In *Harper* v. *Secretary of State for the Home Department* [11] Roxburgh J. granted an injunction to restrain the Secretary of State from submitting draft Statutory Orders in Council to Her Majesty in Council after approval by both Houses of Parliament; and though the Court of Appeal [12] reversed his decision, the question of jurisdiction was left open. Here the draft scheme is not even a draft statutory instrument. Even if it had been, laying it before Parliament would not be a step in the legislative process, since the draft of the scheme requires approval by both Houses and the time for such approval is not defined by any period starting with the time of laying: Statutory Instruments Act, 1946. Laying the draft of the scheme in this case is merely an executive act performed by a person designated by statute for the convenience of Members of Parliament, so that they can inform their minds if so desirous. Parliament is not seized of the matter till a resolution is moved.

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[5] 43 T.L.R. 106.

[6] The Times, Dec. 18, 1954.

[7] The Times, Dec. 15, 1954.

[8] (1872) L.R. 7 Q.B. 387.

[9] Ante, 238.

[10] [1924] 1 K.B. 171.

[11] The Times, Dec. 18, 1954.

[12] Ante, 238.

This action is not against the Crown. If it were, the action would have been brought against the Ministry of Agriculture as required by section 17 of the Crown Proceedings Act, 1947. If it is not an action against the Crown because the acts complained of are not done by the Minister in his representative capacity, the distinction to be drawn is whether or not he acts in a capacity representative of the Crown: *Mackenzie-Kennedy* v. *Air Council.*[13] The defendant is not acting as representative of the Crown, but either in an official though not representative capacity as persona designata by the statute, or alternatively, merely in an individual capacity. As a person designated by the statute the defendant was only acting as a conduit pipe. In neither case is he protected against an injunction; that protection could only extend to him in a representative capacity. In *Harper* v. *Secretary of State for the Home Department*[14] Roxburgh J. held that the Secretary of State was acting as persona designata and not in his general capacity as Secretary of State; and this point was left open in the Court of Appeal. [*Ealing Borough Council* v. *Minister of Housing and Local Government*[15] was also referred to.]

In the last resort the question whether the Minister is or is not acting in a representative capacity depends on whether the scheme is or is not ultra vires, for as the Crown can do no wrong, if the scheme is ultra vires and unlawful, the Minister cannot be acting in his representative capacity.

Sir Reginald Manningham-Buller A.-G. replied.

UPJOHN J., having stated the facts, continued: The ground on which the plaintiff seeks the order on this motion is that the draft scheme now before both Houses of Parliament is in certain parts ultra vires the powers conferred by the Agricultural Marketing Act, 1931. He submits that whereas the Act is an

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[13] [1927] 2 K.B. 517; 43 T.L.R. 733.

[14] The Times, Dec. 18, 1954.

[15] [1952] 1 Ch. 856; [1952] 2 T.L.R. 490; [1952] 2 All E.R. 639.

Act to control the marketing of agricultural produce, the scheme seeks to control, not the marketing, but the actual production of potatoes by imposing on registered producers a heavy monetary sanction if they have any excess over a certain acreage under production.

I do not propose to express any views on that, because the Attorney-General has submitted as a preliminary point that the action is misconceived in that the relief sought cannot be obtained against the defendants.

It is conceded by Mr. Walker-Smith that, having regard to section 2 of the Crown Proceedings Act, 1947, he cannot succeed against the Minister if he is acting as representative of the Crown for two reasons. First, because the right defendant under section 17 of the Crown Proceedings Act, 1947, should have been the Ministry of Agriculture, and that body is not before the court. Secondly, that even if that body were before the court, section 21 would preclude him from obtaining any injunction; although, no doubt, if this action proceeds, he may be able to obtain some declaratory order. That is subject always to the possible effect of the concluding words of subsection (8) of section 1 of the Agricultural Marketing Act, 1931.

Mr. Walker-Smith's submission is that this action is not against the Minister in his representative capacity at all: it is against the Minister in another capacity. He submits that the Minister has two other capacities: first, he may have an official capacity, not as representing the Crown but as a person designated to carry out certain functions prescribed by Act of Parliament, that is to say, a person designated to carry out the function of laying before each House of Parliament a draft of the scheme, and, if the scheme be approved, to make an order. That, he submits, is done as a person designated and not as a person representing the Crown.

Alternatively, he submits that the functions of the defendant are purely personal and not in any official capacity at all.

In support of those submissions Mr. Walker-Smith relies upon the observations of Roxburgh J. in *Harper* v. *Secretary of State for the Home Department.*[1] I need not go into that action in any detail; it was an action to restrain the Home Secretary from taking a draft Order in Council, which had been already approved by resolution of both Houses of Parliament, for the approval of Her Majesty.

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[1] The Times, Dec. 18, 1954.

1955

Merricks v. Heathcoat-Amory.

Upjohn J.

Roxburgh J. said[1]: " Secondly, it appears to me that the " Secretary of State, if and when he submits a draft order to Her " Majesty in Council, is not doing it in his general capacity as " Secretary of State, but is doing it as a person to whom the " duty of so doing is expressly delegated by the provisions of this " Act which contains the machinery which is to be used. I do " not as at present advised think that the Crown Proceedings " Act has any bearing on the present case."

It is material to notice that that conclusion was reached on an application by the plaintiff ex parte, the judge not having heard arguments on the part of the defendant. Roxburgh J. granted an injunction ex parte; but when the matter went to the Court of Appeal,[2] this point was left open by Evershed M.R. In his judgment he said[3]: " But I return at the end of my " judgment to the point which I mentioned earlier and on which " I would say one final word, namely, the question of the " defendant to this action. I have said that the defendant is " ' the Secretary of State for the Home Department '—sued, " that is to say, by his official title as a Minister of the Crown. " It is said by Sir Andrew that, since the report disregarded the " rules in the Act of 1949, therefore it is not a report within the " meaning of the Act, and that the Secretary of State has neither " the duty to the House or to anyone else, nor the power or " authority, to take this proposed Order in Council to Her " Majesty. I am not myself satisfied that Sir Andrew is not in " this respect upon the horns of a dilemma. If the whole thing " is a nullity and all he seeks to do is to restrain a particular " individual, who happens at the moment to be the Secretary of " State for the Home Department, I am not satisfied that he " ought not to sue him in his personal capacity as for an " ordinary wrong—though, in that case, it would not be clear to " me what breach of duty to the plaintiffs he was engaged on " committing. On the other hand, if he does sue him, and " rightly sues him, in his capacity as Secretary of State for the " Home Department, then I am not satisfied (though I express " no final view on it, as we have not heard full argument) that " the case is one which, having regard to the terms of the Crown " Proceedings Act, 1947, will lie. And I am not satisfied, having " regard to section 21 of that Act, that on this alternative the " plaintiff could, in any event, obtain an injunction. . . ."

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[1] The Times, Dec. 18, 1954.

[2] Ante, 238; [1955] 2 W.L.R. 316; [1955] 1 All E.R. 331.

[3] Ante, 238, 254.

I have heard full arguments from Mr. Walker-Smith and from the Attorney-General, and I think in those circumstances that I can properly express my own views as to the capacity in which the Minister acts in carrying out or proposing to carry out the relevant functions under section 1 of the Agricultural Marketing Act, 1931. It seems to me clear that in carrying out his functions under that section he is acting as a representative or as an officer of the Crown. He is the Minister of Agriculture, who is responsible for the conduct of agricultural matters in this country; as part of his general responsibility, he was the person who would naturally be designated in the Agricultural Marketing Act as the person to carry out the functions, purposes and policy of that Act. It was no doubt for that reason that it was the Minister who was to approve any scheme under section 1 (1). It was his duty, not merely as a delegated person but as a person acting in his capacity as Minister of Agriculture, to consider the scheme, to hear objections and representations, and to hold inquiries, and he had the power and duty of making such modifications as he thought fit.

It was his duty in his capacity as Minister of Agriculture and not merely as a delegated person, if he was satisfied—with the satisfaction which he had to feel in his capacity as Minister of Agriculture and an official of the Crown—that the scheme would conduce to the more efficient production and marketing of the regulated product, to lay a draft scheme before the Houses of Parliament, and ultimately in the same capacity to make an order bringing the scheme into effect.

It seems to me that from start to finish he was acting in his capacity as an officer representing the Crown. That being so, it is conceded that no injunction can be obtained against him, and therefore the motion fails in limine.

I am not satisfied that it is possible to have the three categories which were suggested. Of course there can be an official representing the Crown, that is plainly this case. But if he were not, it was said that he was a person designated in an official capacity but not representing the Crown. The third suggestion was that his capacity was purely that of an individual. I understand the conception of the first and the third categories, but I confess to finding it difficult to see how the second category can fit into any ordinary scheme. It is possible that there may be special Acts where named persons have special duties to perform which would not be duties normally fulfilled by them in their official capacity; but in the normal case where the relevant or appropriate Minister is directed to carry out some function or policy of some Act, he is either acting in his capacity as a Minister of the Crown representing the Crown, or is acting in his personal capacity, usually the former. I find it very difficult to conceive of a middle classification.

A number of other points of great interest have been argued. Among them was the question whether the court had any jurisdiction and, if so, whether it would be proper in any event to interfere with the proceedings now before Parliament by making an order on the Minister to withdraw the draft scheme or restraining him by order from seeking approval of the scheme. I say no more than this, that I see much force in the arguments put forward by the Attorney-General; but in this delicate and difficult branch of the law it is much better not to express an opinion on any matter which does not directly arise for decision. As I have come to the clear conclusion that the Minister throughout is acting as a Minister of the Crown, when it is conceded that no injunction can be granted, it is much better that I should say no more.

I therefore dismiss the motion with costs.

Motion dismissed.

Solicitors: *Solicitor, Minister of Agriculture, Fisheries and Food; Collyer-Bristow & Co. for Elliot & Gill, Hastings.*

I. G. R. M.

1955
May 26.

Harman J.

In re MIDGLEY, DECD.
BARCLAYS BANK LD. *v.* MIDGLEY.

[1955 M. 594.]

Will—Construction—Class or nominatim gift—Gift of residue in shares to named persons surviving testatrix—Share of beneficiary predeceasing testatrix to accrue to other shares—Revocation of one share by codicil—Whether intestacy as to revoked share.

Administration of Estates—Order of application of assets—Will—Legacies—Intestacy as to share of residue—Pecuniary legacies not specifically charged—Whether chargeable against lapsed gift—Administration of Estates Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 23), *s.* 34 (3), *Sch. I, Part I, para.* 1.

A testatrix, by a will made in 1951, after bequeathing certain pecuniary legacies, bequeathed her residue to her trustees on trust for sale and to hold the proceeds on trust to pay debts and funeral and testamentary expenses, and after such payment to hold the residue in equal shares absolutely on trust for six named persons (some of whom were next-of-kin while others were strangers), with a substituted gift of the share of any beneficiary predeceasing the testatrix to that person's issue if surviving the testatrix, followed by a proviso that the share of any beneficiary predeceasing the testatrix without issue surviving her should be held as an accretion to the other shares. The testatrix later by codicil revoked the bequest of one of the shares.

On the hearing of a summons taken out to ascertain whether (1) the revoked share accrued to the other beneficiaries, or passed as on an intestacy; and (2) if the latter, whether the pecuniary legacies were payable out of the lapsed share or out of the estate as a whole:—

Held, (1) that the gift of residue to the named persons could not be considered as a class gift, so that the revoked share was undisposed of and passed as on an intestacy.

Sykes v. *Sykes* (1868) L.R. 3 Ch. 301 applied. *In re Whiting* [1913] 2 Ch. 1 and *In re Woods* [1931] 2 Ch. 138 distinguished.

(2) That where, as in the present case, it was apparent that there was a partial intestacy and no contrary intention appeared in the will, pecuniary legacies were payable out of the undisposed-of estate by virtue of Schedule I, Part II, para. 1 of the Administration of Estates Act, 1925.[1]

In re Gillett's Will Trusts [1950] Ch. 102; 65 T.L.R. 727; [1949] 2 All E.R. 893 and *In re Martin* [1955] 2 W.L.R. 1029; [1955] 1 All E.R. 865 followed. *In re Beaumont's Will Trusts* [1950] Ch. 462; 66 T.L.R. (Pt. 1) 712; [1950] 1 All E.R. 802 not followed.

ADJOURNED SUMMONS.

Hannah Midgley, who died on June 6, 1951, by her will dated August 6, 1950, after appointing the plaintiffs to be her executors and trustees, and bequeathing certain pecuniary legacies, devised and bequeathed the whole of her residue real and personal to the trustees on trust for sale with power to postpone and hold the proceeds "upon trust to pay thereout all my just debts and "funeral and testamentary expenses and to hold the residue

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[1] Administration of Estates Act, 1925, s. 34 (3): "Where the estate of "a deceased person is solvent his real "and personal estate shall, subject ". . . to the provisions, if any, con-"tained in his will, be applicable "towards the discharge of the funeral, "testamentary and administration "expenses, debts and liabilities pay-"able thereout in the order mentioned "in Part II of the First Schedule to "this Act."

Schedule I, Part II: "Order of "application of assets where the "estate is solvent. 1. Property of "the deceased undisposed of by will, "subject to the retention thereout of "a fund sufficient to meet any "pecuniary legacies."

"after such payment (hereinafter called 'my residuary estate') "upon trust for the following persons in equal shares absolutely" [followed by six names, including Polly Huckley] "Provided "that if any of them shall have died in my lifetime leaving issue "living at my death such issue as and when they attain the age "of 21 years shall take by substitution and if more than one in "equal shares per stirpes the share of my residuary estate that "his or her parent would have taken had he or she survived me "Provided further that if any of them shall have died in my "lifetime without leaving issue living at my death the share of "my residuary estate which such deceased person would have "taken had he or she survived me shall be held by the bank as "an accretion to the other share or shares the trusts whereof "shall not at the date of such accruer have failed as aforesaid."

By a codicil dated April 13, 1951, the testatrix provided: "Whereas by my said will I have directed my trustee to stand "possessed of one-sixth of my residuary estate upon trust for "Polly Huckley . . . now I hereby revoke the bequest to the "said Polly Huckley of the said one-sixth share in my residuary "estate and in lieu thereof I bequeath to the said Polly Huckley "a pecuniary legacy of fifty pounds." She further revoked a pecuniary legacy and increased another, and in all other respects confirmed her will.

A summons was taken out to ascertain (1) whether the one-sixth share of Polly Huckley accrued to the shares of the other residuary legatees, or whether it was undisposed of and passed as on intestacy; (2) if the latter, whether the pecuniary legacies were payable out of the revoked share or out of the estate generally.

Question 1.

M. W. Cockle for the trustees.

H. E. Francis for the residuary legatees. It is submitted that the cases fall into three classes. First, when a gift is given by will to a class, and a codicil revokes the gift to one of the members, the revoked share accrues to the shares of the others and there is no lapse. Secondly, where the gift is to several persons nominatim, a revoked share passes as on an intestacy, as in *In re Forrest.*[2] Thirdly, there is an intermediate case where the gift is not strictly to a class, but the testator directs that the share of any beneficiary predeceasing him shall accrue to the shares of the others; in such a case the gift is treated as a class gift, and a revoked share accrues to the others: *In re Whiting* [3]; *In re Woods.*[4] In the present case, which is indistinguishable from *In re Woods*,[4] the testatrix has shown a clear intention that of the named persons who do not have issue only those shall take who are living at her death; that appears from the second proviso. The revoked share should accordingly accrue to the other named beneficiaries.

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[2] [1931] 1 Ch. 162.

T. A. C. Burgess for the next-of-kin. In *In re Woods*,[5] Maugham J. was careful to say that he was not deciding more than was necessary. *Sykes* v. *Sykes* [6] was not referred to, and it is submitted that if it had been cited Maugham J. would not have felt at liberty to decide as he did. It will be seen from the report of *Sykes* v. *Sykes* at first instance,[7] where the will is set out, that that case and the present are not properly distinguishable.

HARMAN J. Hannah Midgley, a widow, made her will on August 9, 1950. She had no near relatives. She gave her residue to six persons, some of whom were relatives of hers and are in fact among the class of her next-of-kin, being children of aunts or uncles; the others were strangers. One of those strangers was Polly Huckley, of 24, Peel Place, Keighley.

After giving her residue to these persons, who cannot be described as a class, or even, I think, as a group taking in equal shares absolutely, the testatrix provides in the familiar manner that if anyone of them dies in her lifetime leaving issue, such issue is to be substituted for the parent. She further provides that if any of them dies in her lifetime, not leaving issue, then there is to be an accruer of the share which would otherwise lapse. So she has provided for both events, and there could not be a lapse so long as any one of the six named legatees survived her by himself or his issue.

Six months later the testatrix made a codicil and recited in it that she had left one-sixth of her residue to Polly Huckley. She goes on: "I hereby revoke the bequest to the said Polly "Huckley of the said one-sixth share of my residuary estate and "in lieu thereof I bequeath to the said Polly Huckley a pecuniary "legacy of £50 absolutely." She then gives an additional legacy to a legatee already named in her will, and in all other respects confirms it.

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[3] [1913] 2 Ch. 1.
[4] [1931] 2 Ch. 138.
[5] Ibid.
[6] (1868) L.R. 3 Ch. 301.
[7] (1867) L.R. 4 Eq. 200.

She died on June 6, 1951, and the question is: what happens to the one-sixth of her residue given by the will to Polly Huckley, which amounts to something like £1,000? The contest is between the other residuary legatees and the next-of-kin of the testatrix, the latter being represented for this purpose by the last two defendants.

Mr. Francis submitted to me that there are three classes of gift in these circumstances. First, a class gift, when the revocation of a gift to one member of the class will not make it less a class gift to the others and there will be no lapse. Second, a gift to A, B, C, D and E by name in equal shares, in which case if a codicil revokes the gift to one of them there will be a lapse of that one share. Third, an intermediate class where there is not a gift to a class, but something very like one, and the testator has shown a clear intention that those who survive him shall take. Then, if the codicil revokes the gift to one of that group, so to call it, there is no lapse and the gift is treated as though it were a class gift.

That last theory is supported by two cases. One is *In re Whiting*,[8] before Joyce J., and the other is *In re Woods*,[9] before Maugham J. In each of those cases, I think, the judge appreciated that he was making an exception to the general rule. Each felt that to do otherwise would be to defeat the testator's intention, as he saw it; and they felt themselves free to accede to the view that an expression of intention that only those who were living should take was enough to push the gift over into the first category and take it out of the second category. In *In re Woods* [9] it was easy to do that, because the beneficiaries were in fact a class. They were the daughters of the testatrix. It is true that she named them. She said, "My four daughters, "A, B, C and D" and continued, "or such of them as shall "be living at my death." That is as near to being a class gift as makes no matter, and in fact it was argued that it was a class gift. Maugham J. said that he did not think he need decide that, because he felt that it was tantamount to one. If I may say so, it was easy to see in that case that it would have been denying the intention of the testatrix to hold otherwise; none the less the judge was at pains to distinguish the case.

It does not appear that *Sykes* v. *Sykes* [10] was cited to the judge, although *In re Forrest* [11] was so cited, and that deals with *Sykes'* case. Maugham J. said [12]: " This much, however, may " be asserted of a gift to A, B and C and D ' or such of them " ' as shall be living at my death,' that the testator is looking " at them, if not as a class in the technical sense, at any rate " as a group of persons who have got to be living at the death " of the testator in order to take any interest under the bequest; " and, if the testator is so regarding the persons named and by " his codicil uses language which shows that one of the persons " named is to have no benefit under the gift contained in the will, " it does not, in my opinion, take a very long step to conclude " that the other members of the group, using the neutral term, " shall take the whole of the interest which he in the first " instance was desirous of giving to those of the group who should " be living at his death."

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[8] [1913] 2 Ch. 1.

[9] [1931] 2 Ch. 138.

[10] L.R. 3 Ch. 301.

He then goes on to explain why it is that if the primary gift be a gift to a class there is no lapse, and he says that the ground of the decision in those cases is that where there is a gift to a class [13] " the presumption is that the testator only desires those " members of the class who shall be alive at his death to take; " and from that the court concludes that he also desires that " only those members of the class who are living at his death and " capable of taking shall take. In my opinion the same result " should follow in such a case as the present."

It is said that in the two provisos here following the original gift the testatrix has equally provided that only those who survive her shall take; and that the step I am asked to take is no longer than that taken by Maugham J. I do not take that view. I do not think that I am at liberty to take that step.

Clauson J. in *In re Forrest*,[14] which was decided in the same year, declined to take it, notwithstanding that Joyce J. had taken it earlier, and he explained that he felt himself bound by Lord Cairns' decision in *Sykes* v. *Sykes* [15] to hold that where there was not a class gift there was not any reason to prevent a lapse. In my judgment, that is so in the present case. It appears from *Sykes* v. *Sykes*, as reported at first instance,[16] that there were in fact two provisos which were to the same effect as the two provisos in the present case. Yet Lord Cairns did not feel at liberty to treat the case as a class gift. I do not think that I am at liberty to do so either.

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[11] [1931] 1 Ch. 162.
[12] [1931] 2 Ch. 138, 143.
[13] Ibid.
[14] [1931] 1 Ch. 162.
[15] L.R. 3 Ch. 301.
[16] L.R. 4 Eq. 200.

It seems to me that this is a gift by a will to six persons, not a class and not, I think, a group. It is true that, like most testators, this testatrix did not intend to die intestate: no testator does, except under very odd and exceptional circumstances. All that happened was that when she came to make a codicil she forgot to provide for the hole which it made in the structure of the will. Perhaps if it had been pointed out to her that she had made a hole she would have said, "Yes, let it "accrue" or something of the sort; but I do not feel at liberty to impute to her an intention which I do not think she ever had.

Quite apart from that feeling, it seems to me that it is important that there should be uniformity in these matters and the less exceptions made to a general rule the better. This rule is a sound one and should not be departed from unless under the stress of very strong conviction, which I do not feel here.

Consequently, I hold that the testatrix died intestate as to one-sixth of her residue.

Question 2.

Francis. It is conceded that the debts and funeral and testamentary expenses are payable out of residue as a whole, but the pecuniary legacies are payable out of the lapsed share. That is the effect of section 34 (3) and Schedule I, Part II, of the Administration of Estates Act, 1925: see *In re Gillett's Will Trusts*,[17] where the provisions in the will are indistinguishable from those in the present case. It would seem that *In re Beaumont's Will Trusts* [18] is in conflict with that, but it is submitted that that case ought not to be followed, as having been based on the false premise that there was nothing in the Act or Schedule dealing with the payment of pecuniary legacies. It does not appear that *In re Gillett's Will Trusts* [19] was cited. The Schedule applies, and the legacies should be paid out of the lapsed share.

Burgess. In *Beaumont's* case [20] the argument, based on *In re McKee*,[21] was that where there was a trust for sale, the Act did not apply and recourse had to be made to the old law. There is a trust for sale in the present case. In the most recent case, *In re Martin*,[22] where it was held that the legacies must be met out of undisposed of real estate, there was no trust for sale, so that that case is distinguishable from *In re Beaumont's Will Trusts.*[23]

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[17] [1950] Ch. 102; 65 T.L.R. 727; [1949] 2 All E.R. 893.

[18] [1950] Ch. 462; 66 T.L.R. (Pt. 1) 712; [1950] 1 All E.R. 802.

[19] [1950] Ch. 102.

[20] [1950] Ch. 462.

[21] [1931] 2 Ch. 145; 47 T.L.R. 424.

[22] [1955] 2 W.L.R. 1029; [1955] 1 All E.R. 865.

HARMAN J. The question now arises: out of what sum are the pecuniary legacies to be paid? Having regard to the form of the will, it is clear that the debts, funeral and testamentary expenses are to be paid out of the whole fund before the division of the shares, and that is conceded; but the trust for sale created by clause 3 says nothing about legacies which are not charged on any specific portion of the estate.

I am to look, as it seems to me, to section 34 (3) of the Administration of Estates Act, 1925, which deals with the method of administering the estate of a deceased person who is solvent. The section only purports to apply to the method of the discharge of the funeral, testamentary and administration expenses, debts and liabilities; nothing is said in the section about legacies. So far it appears that the law about payment of legacies had not been altered, but when I turn to Part II of Schedule I, which is specified by section 34 (3) as the place where the order of administration is to be found, I find this: "Order of application "of assets where the estate is solvent. 1. Property of the "deceased undisposed of by will, subject to the retention there-"out of a fund sufficient to meet any pecuniary legacies." Therefore, one must first retain out of the undisposed-of property a fund sufficient to meet any pecuniary legacies, and must pay the debts, testamentary expenses and so forth out of the rest of the property undisposed of.

What, then, is to be done with the fund which has been retained thereout? The answer, it seems to me, is that it must be used to meet the pecuniary legacies, because it has been retained for that purpose. It is, if I may say so, a tortuous way of legislating, but that is what I should have thought the words inevitably mean; and so, indeed, Danckwerts J. concluded in *In re Martin.*[24] It is true that there was undisposed-of real estate and no trust for sale, I think, which applied to it. Any trust for sale would have failed because of the failure of the gift. Danckwerts J. said[25]: "It seems to me that here I am "dealing simply with one asset, the undisposed-of real estate, "and out of that undisposed-of real estate a fund is to be "raised to provide for the pecuniary legacies, and if the fund "is not to be raised for the payment of the pecuniary legacies,

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[23] [1950] Ch. 462.

[24] [1955] 2 W.L.R. 1029.

[25] Ibid. 1035.

1955

MIDGLEY, DECD., *In re.*
BARCLAYS BANK LD.
v.
MIDGLEY.

Harman J.

"it is difficult to see what reason there is for setting aside "the fund. Therefore I am necessarily driven to the conclusion that the proper fund to meet the legacies in the present "case is the undisposed-of property according to paragraph 1 of "Part II of Schedule I to the Act." That seems to me, if I may say so, to be right.

I am told, however, this does not apply to a case where there is a trust for sale, and I was referred to a former decision of the same judge, *In re Beaumont's Will Trusts.*[26] The end of the headnote in the Law Reports begins: "*Held*, that, in effect, "no provision at all was made by section 34 (3), with regard to "such things as legacies, so that the law in force before 1926 "applied to the legacies in question, and the pecuniary and "specific legacies and the duty on them were all payable out "of the whole estate before the division of the residuary estate "into four equal parts . . ." The judge purports to follow the case of *In re Thompson.*[27]

The argument that prevailed in *Beaumont's* case[28] was apparently that where there was a trust for sale imposed by the will, that excluded the Act altogether, because it excluded section 33 of the Act. I confess that I do not follow that argument.

In coming to this conclusion, Danckwerts J. did not follow the decision of Roxburgh J. in *In re Gillett's Will Trusts,*[29] which was apparently not cited. In that case (it is true on some concessions from counsel) it was held that the first paragraph of the Schedule made the legacies payable out of the undisposed-of property. That rule may not apply when there is no intestacy apparent at the death of the testator. I am not suggesting that anything I say covers such a case; but where, as here, it is apparent that the testator is to some extent intestate at his death and where no contrary intention appears in the will, then, as it seems to me, the effect of the first paragraph of the second part of the Schedule does apply to make the pecuniary legacies payable out of the undisposed of money or property, whatever they may be, and I so hold in this present case.

Declaration accordingly.

Solicitors: *T. D. Jones & Co. for Hargreaves, Barking; Woodcock, Ryland & Co. for Standring, Taylor & Co., Rochdale.*

F. R. D.

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[26] [1950] Ch. 462.

[27] [1936] Ch. 676; [1936] 2 All E.R. 141.

[28] [1950] Ch. 462.

[29] [1950] Ch. 102.

1955
May 16, 17, 27.

Wynn-Parry J.

CHIVERS & SONS LD. *v.* AIR MINISTRY.
QUEENS' COLLEGE, CAMBRIDGE (THIRD PARTIES).

[1951 C. No. 2436.]

Ecclesiastical Law—Benefice—Burden—Lay rectory—Repairs to chancel—Repairs paid for by one impropriator—Claim for contribution to costs from another impropriator—All rectorial lands sold by original impropriator—Burden to repair chancel on owner for the time being of rectorial lands—Not within implied covenant on sale for valuable consideration—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *Sch. II.*

Vendor and Purchaser—Implied covenant—Indemnity as to purchaser's liabilities—Repairs to chancel—Liability not imposed by vendor.

By an enclosure award of 1834 and a private Act of Parliament of 1833 certain lands were allotted to Queens' College, Cambridge, in lieu of rectorial tithes and glebe land and rights of common belonging to the Rectory of Oakington, of which Queens' College was then the sole lay rector. Queens' College conveyed part of those lands to the plaintiffs in 1924, a second part to persons not concerned in this action in June, 1940, and the remainder thereof to the defendant, the Air Ministry, in December, 1940.

On May 16, 1950, the plaintiffs, at the request of the Parochial Church Council of Oakington, paid £80 10s. for the repair of the chancel of the parish church of Oakington. The plaintiffs claimed a contribution from the defendant, as one of the impropriators. The defendant denied that it was an impropriator and contended that Queens' College remained the impropriator notwithstanding the sale of all the rectorial land.

In third party proceedings against Queens' College, the defendant claimed that if it should be held liable to contribute to the cost of the repair of the chancel, it was entitled to compensation under the implied covenant on conveyance for valuable consideration in Schedule II to the Law of Property Act, 1925, as being a liability within the words "claims, and demands, other than those subject "to which the conveyance is expressly made, as . . . have been or "shall be made, occasioned, or suffered by that person [the vendor] " . . .":—

Held, (1) that as the liability to repair the chancel was a personal and several liability which fell on the owner or owners for the time being of the rectorial lands, the plaintiff was entitled to contribution from the defendant.

Wickhambrook Parochial Church Council v. *Croxford* [1935] 2 K.B. 417; 51 T.L.R. 424 applied.

(2) That as the liability to repair the chancel was not imposed by Queens' College but by the combination of the common law, the Enclosure Act of 1833, and the enclosure award of 1834, which attached to the land at the moment Queens' College received it,

it did not fall within implied covenant under Schedule II, so that the claim against the third parties failed.

David v. *Sabin* [1893] 1 Ch. 523; 9 T.L.R. 240 and *Egg* v. *Blayney* (1888) 21 Q.B.D. 107 applied.

Stock v. *Meakin* [1900] 1 Ch. 683; 16 T.L.R. 284 distinguished.

Action and third party proceedings.

The plaintiff company, Chivers & Sons Ld., as one of the impropriators of the impropriate rectory of Oakington, in the county of Cambridge, sued the Air Ministry for a declaration that the Ministry was also one of the impropriators of the rectory and as such was liable to maintain or to contribute to the maintenance in a proper state of repair of the chancel of the parish church of Oakington. They also asked for an order that the defendant should pay a proper contribution to the plaintiffs, who, on May 16, 1950, at the request of the Parochial Church Council of Oakington, had paid the sum of £80 10s., which was agreed to represent the reasonable costs of repairs to the chancel effected in November and December, 1949. It was agreed that for the purposes of this case if the defendant was liable so to contribute, the proper basis on which to calculate its liability was by reference to the acreage of the rectorial land held by the plaintiff company and the defendant respectively.

The defendant denied that it was an impropriator of the rectory, and claimed, therefore, that it was not liable to make any such contribution. In case that defence should fail, it had brought third party proceedings against Queens' College, Cambridge, from whom, in that event, it claimed compensation.

The relevant facts were agreed between the parties, and embodied in the "agreed admissions" from which the following statement of facts is taken. By a conveyance dated February 8, in the second year of the reign of Queen Elizabeth I (1559–60), and made between Anthony Pope of the one part and Queens' College of the other part, the said Anthony Pope conveyed unto Queens' College the Lordship and Manor of Oakington in the county of Cambridge, and the rectory and parsonage of Oakington, with all tithes and emoluments belonging thereto, together with the patronage gift and nomination of the vicarage of the parish church of Oakington, and other interests therein contained. By an enclosure award made on November 6, 1834, in pursuance of a private Act of Parliament (3 & 4 Will. 4, c. xv), certain lands were allotted to Queens' College as to part in lieu of rectorial or great tithes and as to part in lieu of glebe lands and rights of common belonging to the rectory of Oakington. Before the enclosure award the rectorial property had consisted exclusively of all the great tithes arising within the parish and certain glebe lands and rights of common, and after the enclosure award the rectorial property was replaced exclusively by these lands. During the period between the conveyance of February 8, 1559–1560, and October 1, 1924, Queens' College was the sole lay rector of the impropriate rectory of Oakington, and as such, prior to the award, had been entitled to all tithes, rights of glebe and rights of common appurtenant to the rectory, and thereafter to the lands allotted under the award. By a conveyance dated October 1, 1924, and made between Queens' College of the one part and the plaintiff company of the other part, Queens' College conveyed to the plaintiffs the fee simple in a part of these lands. The plaintiff company had since October 1, 1924, remained and still was the owner of the fee simple in those lands. By a conveyance dated June 7, 1940, Queens' College conveyed a further part of the lands allotted under the award of 1834; Queens' College had not since the conveyance of June 7, 1940, been, and was not now, owner of the land then conveyed, or any part of or interest in it. By a conveyance dated December 9, 1940, and made between Queens' College of the one part and the Secretary of State for Air of the other part, Queens' College conveyed to the Secretary of State for Air the fee simple in the remainder of the lands which they had received under the award. The Secretary of State for Air, or the defendant, had since December 9, 1940, remained and still was the owner in fee simple of that land. The lands conveyed respectively by the three conveyances formed the whole of the lands included in the enclosure award of 1834 which were allotted to Queens' College as rector in lieu of their former rectorial property.

The defendant claimed that Queens' College remained the lay impropriator notwithstanding that they had alienated the whole of the rectorial property; and in the third party proceedings it contended that the conveyance not being expressly subject to the liability to repair the chancel, it was entitled to be indemnified under the covenants implied under Schedule II to the Law of Property Act, 1925.[1]

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[1] Law of Property Act, 1925, Sch. II: "Part I. Covenant implied in a conveyance for valuable "consideration, other than a mortgage, by a person who conveys and "is expressed to convey as beneficial "owner. That, notwithstanding any-"thing by the person who so conveys "or anyone through whom he derives "title otherwise than by purchase "for value, made, done, executed, or "omitted, or knowingly suffered . . .

J. Neville Gray Q.C. and *Peter Foster* for the plaintiffs. The plaintiffs claim contribution from the Air Ministry on the ground that it is one of the impropriators of this rectory. The judgment of the Court of Appeal in *Wickhambrook Parochial Church Council* v. *Croxford* [2] shows, where the rectorial properties are divided up, that: (1) each owner of any portion of it is liable to repair the chancel; (2) each owner is severally liable to pay the whole costs of repairing it, and (3) he is entitled to get back from the other several owners the contribution properly payable by that person. It may be that the Air Ministry can establish some right to compensation against Queens' College, but, as between the plaintiffs and the Air Ministry, the *Wickhambrook* case [2] is clear authority that the plaintiffs are entitled to get back the proper proportion payable by it as an impropriator. A slight indication of how that proportion is to be ascertained is given at the end of the judgment of Romer L.J. in the *Wickhambrook* case.[2] In the present case, if the plaintiffs are entitled to any contribution, it is not disputed that it is based on the proportionate acreage of the impropriators concerned.

Denys Buckley and *H. A. Fisher* for the defendant. The Air Ministry is not liable to contribute to the repair of the chancel; alternatively, if it is so liable it is entitled to be indemnified by Queens' College. That can only be so if on the true construction of the facts the Air Ministry is not, as it contends it is not, one of the impropriators. Before 1834, Queens' College was the sole impropriator and the Air Ministry could only have become an impropriator if the sale of these lands to it in 1940 had deprived the college of its character of impropriator.

Liability to repair the chancel is the personal liability of the rector. The rectory is the name given to the bundle of rights which constitute the rectory, i.e., the compendious name for all the rights and liabilities which go to make up the benefice: see *In re The Alms Corn Charity.*[3] But these are not rights which subsist in perpetuity in particular property. A person could always alienate land in respect of which he was the rector, for

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"freed and discharged from, or "otherwise by the person who so "conveys sufficiently indemnified "against, all such estates, incum"brances, claims, and demands, "other than those subject to which "the conveyance is expressly made, "as, either before or after the date of "the conveyance, have been or shall "be made, occasioned, or suffered by "that person or . . . by, through, or "under anyone through whom the "person who so conveys derives title, "otherwise than by purchase for "value; . . ."

[2] [1935] 2 K.B. 417; 51 T.L.R. 424.

[3] [1901] 2 Ch. 750.

instance, where glebe land was exchanged for other land: see Clergy Residences Repair Act, 1776, and Halsbury's Statutes, 2nd ed., vol. 7, p. 712. Tithes have rather a different character, and the court might be more ready to assume on the sale of tithes than on the sale of land that rights were being disposed of which were part of the rectory, although even tithes could be disposed of without the purchaser becoming a rector: see Eagle on Tithes (1836), vol. 1, p. 75. It is clear from that passage that tithes could be disposed of by the rector so that they became severed altogether from the rectory: see also *Williams* v. *Bacon.*[4] A severance should be presumed against even a spiritual impropriator.

It is not suggested that the rector cannot sell the whole or a part of the rectory, but one must see whether what he has sold is or is not the whole of the rectory. The Glebe Lands Act, 1888, which authorized the sale of glebe lands, makes it clear that the purchaser acquires them free from any rights of glebe, and glebe land when disposed of would lose its character of glebe land. In *In re The Alms Corn Charity*[5] the Ecclesiastical Commissioners conveyed the land free from the obligation to repair the chancel of the church, which they could not have done if the plaintiffs be right.

The effect of the Enclosure Act was to vest in the college land on which there was no clog and which could be disposed of freely. The documents relating to the sale to the Air Ministry show that this was not the sale of property carrying part of the liabilities of the rectory; it was merely the sale of a piece of land.

Alternatively, if the Air Ministry is one of the impropriators and has a collateral liability to repair the chancel, it is entitled to be indemnified by Queens' College under the implied covenants contained in Schedule II to the Law of Property Act, 1925: see Wolstenholme and Cherry's Conveyancing Statutes, 2nd ed., vol. 1, p. 637. This liability is a claim or demand, within the meaning of Schedule II, suffered by Queens' College when they accepted the land allotted under the award. The Air Ministry is therefore entitled to be indemnified, unless it had expressly agreed that it should be excluded.

A lay impropriator who becomes entitled to property as part of the rectory is as free to dispose of it as any other landowner, and unless he sells expressly subject to the liability to repair the chancel, as was done in *Hauxton Parochial Church Council* v. *Stevens*,[6] the purchaser will take free from that liability.

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[4] (1823) 1 Sim. & St. 415.

[5] [1901] 2 Ch. 750.

W. S. Wigglesworth for Queens' College. The three impropriators of the rectory are now the plaintiffs, Papworths and the Air Ministry, and Queens' College has wholly ceased to be the lay impropriator. The rectorial property consisted, and still consists, exclusively of the three pieces of land hitherto owned by them, and nothing that Queens' College could do could deprive those pieces of land of their rectorial quality. The duty to repair the chancel is a personal duty imposed by the common law on whosoever may own the rectorial property. The right of the parishioners of Oakington is to have the chancel repaired by the impropriator, and Queens' College has no power to do anything to impair that right, which is against the owners of that land: see the argument of *Errington* in *Hauxton's* case.[7]

It was argued that Queens' College had the option to sell the land as land or as part of the rectory; that is not well founded, as it would mean that the rights of the parishioners could lie either against the owners of the rectorial land or against the sellers who had parted with possession of the land, and who might not have the means to repair the chancel. On that argument the vendor of rectorial land could gravely affect the rights of the parishioners who were not parties to the conveyance. Queens' College cannot choose who should repair the chancel; the common law imposes the duty on the owners for the time being of the rectory.

[WYNN-PARRY J. Of what does the rectory consist?]

It is a bundle of rights attached to property with which Queens' College parted on these conveyances.

[WYNN-PARRY J. You are saying that the nature of the rectory was fixed once and for all by the Enclosure Act and the award?]

Certainly; it would take another Act of Parliament to alter the constitution of the rectory so that it consisted of anything other than these three pieces of land. Although this liability can only be altered by statute, the several owners can among themselves make what arrangements they like.

Hauxton's case[8] is an example of this liability being enforced against the impropriator of the impropriate rectory, who was liable as the person in receipt of the profits. The duty to repair the chancel only arises when it is out of repair: *Neville* v. *Kirby.*[9] This liability, which is always a personal duty imposed on the owner of rectorial property, arises not from his having peculiar property or an interest therein, but by the custom of the realm. This duty was imposed by the common law on the rector not because the chancel was vested in him—the rest of the church was equally vested in him—but as the owner of the profits of the benefice; it is based on the principle that he who has the benefit of the emolument must bear the burden.

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[6] [1929] P. 240.

[7] [1929] P. 242, 243.

[8] [1929] P. 240.

This is not a charge on the land; it is a claim or demand affecting the land, for failure to perform which the owner of the land was liable to be admonished before the Chancel Repairs Act, 1932.

The position under the Tithe Act, 1936, in respect of tithe rentcharge is a parallel case; it is a modern example where the liability falls on whoever is the owner of the particular land. In *Wickhambrook Parochial Church Council* v. *Croxford*[10] the owners of a severed rentcharge were all held to be liable.

The Clergy Residences Repair Act does not assist the defendant in this case, as that relates to sales under statute, and it is conceded that property could lose its rectorial character by statute. *Williams* v. *Bacon*[11] was cited as an example of how a spiritual rector could convey away tithes, but that is no authority for the proposition that the grantee of part of rectorial land should be free of the liability to repair the chancel. In *Hauxton's* case[12] the parishioners would have had the right to demand that all the owners should repair the chancel, and the Ecclesiastical Commissioners could have done nothing to alter that right as between the several owners, because there is an apportionment of liability. Section 31 and Schedule VII of the Tithe Act, 1936, made provision for the apportionment of the liability to repair the chancel which attached to tithe rentcharge.

Queens' College admit that this liability was overlooked by their solicitors when the preliminary inquiries were answered, but it was equally overlooked by the solicitors for the Air Ministry, as the abstract of title began and ended with the award under the Enclosure Act. [He referred to the Enclosure Act, 1833, ss. xxxii to xxxv.] The abstract showed plainly that these lands were being allotted in lieu of rectorial property, such as glebes, tithes and rights of common. The Ministry's solicitors had the opportunity of raising the point and should have done so; if it were not raised that would constitute a defence to an action for specific performance.

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[9] [1898] P. 160.

[10] [1935] 2 K.B. 417.

[11] 1 Sim. & St. 415.

[12] [1929] P. 240.

The form of the covenants contained in Schedule II to the Law of Property Act is not new; it represented the practice of conveyancers over a long period: see *Browning* v. *Wright* [13]; *David* v. *Sabin*,[14] and Wolstenholme and Cherry's Conveyancing Statutes, 2nd ed., vol. 1, pp. 637–8. The covenant is governed by the opening words: see *David* v. *Sabin*,[14] *per* Lindley L.J.[15] Queens' College received these lands under the award by way of exchange; that constitutes a purchase for value and the covenants extend only to the acts and omissions of Queens' College between the award of 1834 and the conveyance to the Air Ministry of 1940. The liability to repair the chancel arose under a combination of the common law, the Enclosure Act and the award of 1834, and was not imposed on Queens' College by any act or omission by them after the purchase. The liability was not something "suffered" by Queens' College within the meaning of the schedule, which means something which a person could avoid, otherwise it would cover all kinds of liabilities imposed on a landowner. Queens' College could not help this liability accruing to them as owners; it attached to them at the moment they received the land from the Ecclesiastical Commissioners. The liability is not, therefore, within the covenants.

Buckley in reply. There is nothing in the cases to support the contention that the parochial church council had rights which had crystallized for all time in the land awarded under the Enclosure Act. In *Hauxton's* case [16] this was not considered to be so, and it was held there to be a matter of construction of the relevant documents; but if the argument for Queens' College be right the chancellor could not have so held. It begs the question to say that the parishioners' rights are against the owners of the land; they are against the person entitled to the benefice. The Tithe Act cannot be relied on to show that this liability attaches to particular land: see Millard's Tithes, 3rd ed., p. 143.

It was never part of the case for the Ministry that the lay rector may not sell part of his rectorial property if he adopts the right procedure, but no case has been cited where the purchaser has become one of the lay impropriators. Eagle on Tithes (p. 75) shows that a lay impropriator has an absolute right to alienate the rectorial property without ceasing to be the impropriator.

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[13] (1799) 2 Bos. & P. 13.

[14] [1893] 1 Ch. 523; 9 T.L.R. 240.

[15] [1893] 1 Ch. 531.

[16] [1929] P. 240.

1955

CHIVERS & SONS LD.
v.
AIR MINISTRY.

Williams v. *Bacon* [17] is relied on not because it has anything to do with the repair of a chancel, but for the principle that a lay rector can dispose of part of his tithe lands apart from the rectory. Even where he has parted with the land the rector is the person liable to repair the chancel; the liability rests on the rector and his successors.

This liability, although it was not anything done or omitted by Queens' College, was "suffered" by them because, when the property vested in them, this liability attached to it. In these covenants "suffered" does not mean something which the owner has omitted to do; it means something to which the owner has become subject, and knows that he is subject to it. Thus, in *Stock* v. *Meakin* [18] it was held that the apportioned expenses of private street works was an incumbrance "suffered" by the vendor.

Wigglesworth in reply. The qualifying words preclude Queens' College from being liable on the covenants. The distinction between *Stock* v. *Meakin* [18] and this case is that expenses under the Private Street Works Act, 1892, constituted a charge on the land. This liability is not a charge on the land; it cannot be asserted against Queens' College after they had parted with the land. This case is more like *Egg* v. *Blayney*.[19] Alternatively, the words of Lord Eldon in *Browning* v. *Wright*,[20] that the property was transmitted in the condition in which it was received, are relied on.

Gray Q.C., in reply, adopted the argument of Wigglesworth, and referred to *Rex* v. *St. Edmundsbury and Ipswich Diocese (Chancellor)*.[21]

Cur. adv. vult.

May 27. WYNN-PARRY J. read a judgment, in which he stated the facts and continued: It has long been established that the liability of an impropriator of a lay rectory to maintain the chancel is rested on the maxim that he who has the profits of the benefice should bear that burden. This burden is imposed for the benefit of the parishioners who by the custom of England have the liability to repair the nave but the corresponding right to require the rector to repair the chancel, and the rector, in turn, has the rectorial property out of the profits of which he is considered to have the means to do this. The history of the matter is dealt with at length by the Court of Appeal in *Wickhambrook Parochial Church Council* v. *Croxford*,[1] and there is no need for me to refer to the older authorities which were so exhaustively reviewed in that case. It is sufficient for me to say that, as that case shows, the liability, which, where there is more than one impropriator, is a several and not a joint liability, is not a charge on the rectorial property, but a personal liability imposed on the owner or owners for the time being of the rectorial property. Before the decision in *Wickhambrook Parochial Church Council* v. *Croxford* [1] it was thought by writers that the liability of an impropriator was limited to the profits which he derived from the rectorial property, but in that case the Court of Appeal held that it is not so limited. As I read the judgments in that case, they proceed on the basis that the duty to repair the chancel arises out of the fact of owning the rectorial property or some of it, and that the only question left open was the extent of the liability. If that be a correct appreciation of the basis of those judgments, it follows that in order to decide who is liable to repair the chancel of a church, all that is necessary is to find the owner of the rectorial property. If there is only one owner, he is solely liable. If there is more than one owner, each is severally liable.

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[17] 1 Sim. & St. 415.

[18] [1900] 1 Ch. 683; 16 T.L.R. 284.

[19] (1888) 21 Q.B.D. 107.

[20] 2 Bos. & P. 13.

[21] [1948] 1 K.B. 195; 63 T.L.R. 523; [1947] 2 All E.R. 170.

Mr. Buckley, however, contended that this is not the test. He submitted that although Queens' College had alienated the whole of the rectorial property they still constituted the lay rector. What they had done by the several transactions to which I have referred, was, according to him, merely to substitute one type of property, namely, cash, for the previous property, namely, land. They might, he said reinvest these proceeds of sale in land, and that land would then constitute the rectorial property. His proposition appears to me to involve saying "once a rector, "always a rector," and further to involve shutting one's eyes to the reality of a transaction involving, according to the language of the documents brought into existence to evidence it, a sale of rectorial property.

In the case of the conveyance of December 9, 1940, by Queens' College to the defendant, and of each of the documents which preceded it, they proceed on the basis that Queens' College are selling and conveying Queens' College land, which in fact is rectorial land. If the transaction is indeed a sale and transfer, with what show of reasoning can it be said that Queens' College retained in respect of the land sold and transferred that personal liability to repair the chancel, which attaches to the owner of rectorial property? It was urged that the documents are silent as to this liability, and that therefore Queens' College must be taken to have intended to retain the liability. I am quite unable to accept this argument. The abstract of title shows upon the face of it that the subject-matter of the sale is rectorial land, and in my view it would necessarily follow that the duty of repairing the chancel of Oakington Parish Church would pass to the defendant on the conveyance of the property to it whatever was inserted in or omitted from the conveyance. In my judgment an express clause in the conveyance designed to provide for the retention by Queens' College of the personal liability to repair in exoneration of the defendant would have been quite ineffective against a subsequent claim by the Parochial Church Council against the defendant. The most that could have been achieved by the conveyance, to which the Parochial Church Council was not a party, would have been the inclusion of a provision by which Queens' College indemnified the defendant against any claim by the Parochial Church Council in connexion with the repair of the chancel: see *Hauxton Parochial Church Council* v. *Stevens*,[2] where on the sale of most but not the whole of the lands of a rectory there was as between the Ecclesiastical Commissioners as vendors and the purchaser a covenant to repair the chancel.

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[1] [1935] 2 K.B. 417; 51 T.L.R. 424.

Lay rectors, as constrasted with spiritual rectors, have always enjoyed the right freely to alienate the rectorial property; and on a sale by a lay rector, or for that matter one of several impropriators of a lay rectory, of the whole of his interest in the rectorial property, he could not before the Chancel Repairs Act, 1932, have been admonished to repair the chancel, for having no longer any interest in the rectorial property he would not have been a proper object of admonishment, and therefore no money judgment could be given against him since the passing of that Act. The action therefore succeeds.

I turn now to the claim in the third party proceedings. Mr. Wigglesworth, on behalf of Queens' College, admitted that the solicitors for Queens' College overlooked the liability to repair the chancel when negotiating for and carrying through the sale to the defendant; but he pointed out with force that the abstract of title began and ended with the enclosure award, which showed that the lands in question were allotted in lieu of rectorial property to Queens' College as impropriators, and therefore the solicitors acting for the defendant had full opportunity of raising the point on the requisitions. The matter, however, proceeded to conveyance, and in the result the case against Queens' College is rested solely on the implied covenants in Schedule II to the Law of Property Act, 1925.

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[2] [1929] P. 240.

Mr. Buckley's case is that the liability to repair the chancel falls within the words "claims, and demands, other than those "subject to which the conveyance is expressly made, as, either "before or after the date of the conveyance, have been or shall "be made, occasioned, or suffered by that person . . ." In his submission the result of the parcels being vested in Queens' College was to subject the college to the liability to repair, and therefore by accepting the allotment the college suffered the liability to claims or demands to repair the chancel to arise.

In *Browning* v. *Wright*,[3] Lord Eldon, sitting as Chief Justice, said[4]: "This transaction is a purchase of an estate of inheritance "in fee, and the first question is, what will be the nature and "effect of a conveyance carrying such a contract into execution? "If a man purchase an estate of inheritance and afterwards sell "it, it is to be understood prima facie that he sells the estate as "he received it: and the purchaser takes the premises granted "by him with covenants against his acts. If the vendor has "taken by descent, he covenants against his acts and those of "his ancestor; and if by devise, it is not unusual for him to "covenant against the acts of the devisor as well as his own. "In fact, he says, I sell this land in the same plight that I "received it, and not in any degree made worse by me. It was "argued, that if this were so, a man who has only an estate for "life, might convey an estate in fee, and yet not be liable to "the purchaser. This seems at first to involve a degree of "injustice, but it all depends on the fact, whether the vendor "be really putting the purchaser into the same situation in "which he stood himself. If he has bought an estate in fee, "and at the time of the re-sale has but an estate for life, it must "have been reduced to that estate by his own act, and in that "case the purchaser will be protected by the vendor's covenants "against any act done by himself. But if the defect in his title "depend upon the acts of those who had the estate before him, "and he honestly but ignorantly proposes to another person to

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[3] (1799) 2 Bos. & P. 13.

[4] Ibid. 22.

"stand in his situation, neither hardship or injustice can ensue. "What is the common course of business in such a case? An "abstract is laid before the purchaser's counsel; and though to "a certain extent he relies on the vendor's covenants, still his "chief attention is directed to ascertaining what is the estate, "and how far it is supported by the title. The purchaser, "therefore, not being misled by the vendor, makes up his mind "whether he shall complete his bargain or not, and if any doubts "arise on the title, it rests with the vendor to determine whether "he will satisfy those doubts by covenants more or less extensive. "Prima facie, therefore, in the conveyance of an estate of "inheritance, we are led to expect no other covenants than those "which guard against the acts of the vendor and his heirs."

In *David* v. *Sabin*[5] Lindley L.J. said[6]: "On looking at the "covenant set out in section 7 (1) (A), of the Conveyancing Act, "1881, it will be seen that the covenants for right to convey, "for quiet enjoyment, freedom from incumbrances, and for "further assurance, are not four separate and distinct covenants, "but parts of one entire covenant beginning with and controlled "throughout by the words, 'That notwithstanding anything by "'the person who so conveys, or any one through whom he "'derives title, otherwise than by purchase for value.' These "words render a vendor's covenant a qualified covenant, and "not an absolute warranty of title, as is the covenant by a "mortgagor who conveys as beneficial owner (see clause C of "the same section). The statute has, in this respect, followed "the long-established and well-known practice of conveyancers, "as may be seen from *Browning* v. *Wright*,[7] *Church* v. *Brown*,[8] "and the ordinary forms of conveyances. But, although a "vendor's covenant for title is not an absolute warranty of title, "it is very wide. The acts and omissions covenanted against "are reducible to four heads—viz., (1) the acts and omissions of "the vendor himself; (2) the acts and omissions of persons "through whom he claims otherwise than by purchase for value; "(3) the acts and omissions of persons claiming through him; "(4) the acts and omissions of persons claiming in trust for "him."

As Lindley L.J.[9] points out, the covenant is one and is controlled throughout by the opening words. The covenant extends, therefore, to the acts and omissions of the vendor and to the acts and omissions of anyone who has conveyed to him otherwise than for value. It is clear to my mind that Queens' College received the lands allotted to them under the enclosure award of 1834 by way of exchange and therefore that they were in the position of purchasers for value. Thus the covenants for title extend to the acts and omissions of Queens' College between the date of the award, November 6, 1834, and the conveyance to the defendant of December 9, 1940. Queens' College did not impose the liability to repair the chancel of Oakington Parish Church on the owner for the time being of the land in question. That liability was imposed by a combination of the common law, the Enclosure Act of 1833, and the enclosure award of 1834. It is a liability which attached to the owner of the land in the moment in which Queens' College received the lands by allotment under the enclosure award. That was the plight in which the college received it. Thus it follows that the liability is not one which is covered by the implied covenants in Schedule II to the Law of Property Act, 1925.

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[5] [1893] 1 Ch. 523; 9 T.L.R. 240.

[6] [1893] 1 Ch. 531.

[7] 2 Bos. & P. 13.

[8] (1808) 15 Ves. 258, 263.

[9] [1893] 1 Ch. 531.

I should perhaps refer to *Stock* v. *Meakin*,[10] on which Mr. Buckley relied. The headnote to that case reads as follows: "The amount of the apportioned expenses of private "street works executed by a local authority under the Private "Street Works Act, 1892, becomes a charge on the premises in "respect of which they are apportioned as from the date of the "completion of the works, and not merely as from the date of "the final apportionment. If, therefore, the premises are sold "by the owner free from incumbrances after the completion of "the works, but before the date of the final apportionment, the "vendor must indemnify the purchaser against the sum finally "apportioned in respect of the premises."

Towards the end of his judgment, which was the judgment of the court, Vaughan Williams L.J. said [11]: "The charge takes "effect under the Act of 1875 before the apportionment is made, "and in our judgment it is intended that this shall be so under "the Act of 1892. If this view is right, we have no doubt that "this charge is an 'outgoing' which the vendor was bound by "his contract to discharge. We also have no doubt that the "charge is an 'incumbrance, claim or demand suffered' by "the vendor, notwithstanding the fact that the expenses were "incurred without any default on his part, and that the time for

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[10] [1900] 1 Ch. 683; 16 T.L.R. 284.

[11] [1900] 1 Ch. 694.

"payment had not arrived before the conveyance was executed. "Nor have we any doubt that this charge is inconsistent with "the express terms of the conveyance."

Apart from the circumstance that the liability in question became a charge on the premises, in contrast to the liability under consideration in this case, it is clear that the claim or demand to which the Court of Appeal held that that liability gave rise was a claim or demand suffered by the vendor during his ownership, and on that ground the case is distinguishable from the present case.

Egg v. *Blayney*[12] more nearly approaches this case. The headnote reads as follows: "The expenses of paving a new street "apportioned under section 77 of the Metropolis Management "Amendment Act, 1862, are not a charge upon the property in "respect of which they are payable, and therefore if the owner "sells the property while the expenses are unpaid, and conveys as "beneficial owner, and the purchaser is compelled to pay such "expenses, the purchaser cannot recover the amount so paid from "the vendor under the implied covenant against incumbrances "contained in the conveyance by virtue of section 7 (1) (A) of "the Conveyancing and Law of Property Act, 1881."

In the course of his judgment Field J. said[13]: "If this were "a charge under the Public Health Act, 1875 (38 & 39 Vict. "c. 55), the plaintiff's contention would be correct, for that "Act, by section 257, expressly makes the expenses a charge "upon the land, as was held by North J. in the case of *In re* "*Bettesworth and Richer*.[14] In the Act now before us, however, there is nothing which makes these expenses a charge "on the land, and, therefore, it was only a claim or demand "upon the defendant personally up to the time of the sale, and "did not affect the land. The county court judge was, therefore, "right in holding that it was not an incumbrance within the "meaning of the statutory implied covenant."

Wills J. said[15]: "I am of the same opinion. It is clear that "there is no charge upon the land in the present case, but only "successive personal liabilities imposed upon the successive "owners, and therefore there is no liability under the implied "covenant."

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[12] (1888) 21 Q.B.D. 107.

[13] Ibid. 108.

[14] (1888) 37 Ch.D. 535; 4 T.L.R. 248.

[15] 21 Q.B.D. 108.

1955

CHIVERS & SONS LD. v. AIR MINISTRY.

For these reasons I am of opinion that the claim in the third party proceedings must fail.

Judgment for the plaintiffs in the action; defendant's claim in third party proceedings dismissed.

Solicitors: *Field, Roscoe & Co. for Ginn & Co., Cambridge; Treasury Solicitor; Taylor, Jelf & Co. for Francis & Co., Cambridge.*

I. G. R. M.

C. A.

1955
Feb. 28;
March 17.

Evershed M.R., Jenkins and Romer L.JJ.

In re MAJORY, A DEBTOR.
Ex parte THE DEBTOR *v.* F. A. DUMONT LD.

[No. 757 of 1954.]

Bankruptcy—Extortion—Costs wrongly demanded—Writ issued—Costs offered by debtor — Judgment debt — Demand for offered costs — Whether subsequent bankruptcy petition tainted.
Practice and Procedure—Abuse of process.

After issue of a specially indorsed writ claiming £800 for money lent with £12 5s. costs, but before the issue of any judgment summons, the debtor visited the solicitors acting for the creditor and, having admitted the debt, offered to make an arrangement whereby he could pay off the debt by instalments. The solicitors said that, in addition to being satisfied as to the arrangement, their client might require the debtor to pay all the costs which he, the creditor, had had to incur. The debtor agreed to do so. No mention was made at that stage of bankruptcy proceedings, but the solicitors said that their instructions did not permit them to delay issuing a summons for judgment, and a summons was in fact issued. The debtor's solicitors wrote confirming the offer made to pay by instalments, and adding that the debtor was prepared to pay "your reasonable costs." After judgment was obtained, the creditor's solicitors informed the debtor's solicitors that the offer made by the debtor was unacceptable, and that deferment, if any, could only be on immediate payment of £440 and the balance to be paid in two instalments. The amount of the costs to be paid in addition was stated to be £21, i.e., £8 15s. more than that awarded by the judgment, representing the full amount of legal costs which the creditor had incurred. In bankruptcy proceedings which followed the debtor disputed the petition and opposed the making of a receiving order on the ground that the creditor had attempted in connexion with the proceedings to extort £8 15s. from the debtor in excess of the sums lawfully due:—

Held, (1) that there was no hard-and-fast rule that any agreement made by a creditor with his debtor after the institution or under the shadow of bankruptcy proceedings whereby the creditor was able to get more than he could have recovered at law amounted to "extortion" in bankruptcy law.

In re Bebro [1900] 2 Q.B. 316 applied.

(2) That "extortion" in bankruptcy law was not used in any special or artificial sense divorced from its ordinary meaning.

(3) That while, in general, court proceedings, whether bankruptcy or otherwise, could not be used to obtain for a person some collateral advantage, and a party so using them would be guilty of abusing the process of the court, in bankruptcy proceedings the court would always look strictly at the conduct of the creditor using or threatening such proceedings, and if it concluded that he had acted oppressively the court would not hesitate to declare the creditor's conduct extortionate and would refuse to allow him to make use of the process.

Principle in *In re a Judgment Summons* (*No.* 25 *of* 1952); *Ex parte Henlys Ld.* [1953] Ch. 195; [1953] 1 All E.R. 424 applied.

In re a Debtor (*No.* 883 *of* 1927) [1928] Ch. 199 distinguished.

(4) That, on the facts, the creditor was not guilty of extortion, for the promise by the debtor to pay costs was given before any mention of bankruptcy proceedings and even before the issue of the judgment summons, and was not given as the result of any threat by the creditor.

APPEAL from Mr. Registrar Bowyer.

On August 9, 1954, F. A. Dumont Ld. issued a specially indorsed writ in the Queen's Bench Division of the High Court claiming £800 for money lent and costs amounting to £12 5s. The writ was served on the debtor, George Julius Majory, on August 20. On August 31 the debtor of his own volition called on the solicitors acting for the creditor, and at an interview with their managing clerk, he, the debtor, suggested that he should make an arrangement whereby commission due to a company, Hingeless Products Ld., which, he said, was controlled by him and his wife, from a company known as Thurloe Holdings Ld., should be paid direct to the creditor to discharge his debt of £800, together with a further sum of £40, the amount which the debtor admitted was owing. The managing clerk said that, in addition to being satisfied as to the proposed arrangement with the two companies, his client might require that the debtor should discharge all the costs that the creditor had had to incur over the matter. To this the debtor agreed. No mention was made of bankruptcy proceedings, but the debtor was informed that the instructions given to the solicitors by their client did not permit them to delay issuing a summons for judgment. A summons was in fact issued on September 2, judgment being obtained on September 9. After judgment the creditor's solicitors informed the debtor's solicitors that the offer previously made (which the debtor's solicitors had confirmed by letter between the issue of the judgment summons and the judgment) was unacceptable to the creditor and that if there was to be any deferment, it could only be on payment within two days of £440, together with £21 (representing the creditor's costs on the solicitor and own client basis), and the balance to be paid in two instalments. On the debtor's solicitors protesting against these requirements, the creditor's solicitors suggested a slight modification as to the payment of the instalments, but this suggestion was not accepted by the debtor. On September 15 a bankruptcy notice founded on the judgment debt was issued and was served on the debtor on September 20. The notice expired on September 28, and a bankruptcy petition was filed on October 21. On November 16 the debtor gave notice of his intention to dispute the petition and to oppose the making of a receiving order. The petition was heard on November 24 and a receiving order was made on December 6. The debtor appealed.

The facts are more fully stated in the judgment.

C. H. Duveen Q.C. and *Muir V. S. Hunter* for the debtor. The debtor is appealing against the receiving order on the ground that the petitioning creditor has been guilty of extortion, in that he tried to obtain from the debtor £8 15s. by threatening to take bankruptcy proceedings. Extortion in bankruptcy is not used in the colloquial sense. It may not involve mala fides. It consists in any threat to use the bankruptcy procedure to obtain some advantage to which the creditor is not entitled. Here the creditor asked to be paid £21 for costs, which was £8 15s. more than the costs payable under the judgment. If a creditor obtains solicitor and client costs he is getting a collateral advantage. The law relating to extortion in bankruptcy is entirely based on case law. A rigid line has to be drawn. The fact that the debtor cannot pay what he owes shows of itself that he is not on a footing of equality with the creditor. It has been held that a demand for costs does amount to extortion: *In re a Judgment Summons (No. 25 of 1952); Ex parte Henlys Ld.*[1] In *In re G.; Ex parte B.*[2] the creditor required payment of an extra sum of £20 and the Court of Appeal held that that demand vitiated the subsequent bankruptcy proceedings. Once there has been extortion the creditor's debt is tainted for ever and cannot at any time thereafter be used by him to found a bankruptcy petition: *In re Shaw.*[3] The decision of the Court of Appeal in *In re a Debtor (No.* 883 *of* 1927)[4] shows that a demand for solicitor and client costs will amount to extortion. The decision in *In re Bebro*[5] is distinguishable. There it was held that the creditor put no pressure on the debtor. In this case there was pressure and accordingly extortion.

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[1] [1953] Ch. 195; [1953] 1 All E.R. 424.

[2] (1900) 44 S.J 345.

R. O. C. Stable for the creditor, F. A. Dumont Ld. The question in these cases is where the line should be drawn. Since the decision in *In re a Debtor (No.* 883 *of* 1927)[6] the line has been drawn so as to favour the debtor, but if the court leans too far in his favour it will prevent creditors coming to terms with their debtors and encourage unmeritorious debtors to take advantage of the defence of extortion. In some of the reported decisions the time element was not considered. A threat of bankruptcy proceedings before a writ is issued is irrelevant: *In re H. B.*[7]

There was no element of extortion in the present case. The payment in question was agreed before bankruptcy proceedings had been mentioned by the creditor, and the debtor was a willing party to the agreement to pay the extra costs. There was no demand by the creditor for the costs. There is no rule that after judgment has been entered, but before bankruptcy proceedings are commenced, a creditor must not negotiate with the debtor—such a rule would operate to the detriment of debtors anxious to reach agreement with their creditors and to avoid being made bankrupt. If there is such an agreement there will necessarily be some consideration moving from the debtor.

In re a Debtor (No. 883 *of* 1927)[8] shows that once the jurisdiction of the bankruptcy court has been invoked the creditor must be taken, in effect, to be asking for an equitable distribution of the debtor's estate between his creditors and nothing must be done which conflicts with that. But in the present case the offer to pay costs was made before the jurisdiction of the bankruptcy court had been invoked. In *In re Sunderland*[9] the bankruptcy proceedings had been commenced. A creditor may, of course, be guilty of making an extortionate demand after judgment has been entered and before bankruptcy proceedings are in the air and such extortion will taint the subsequent bankruptcy proceedings, but here the creditor has not done anything inequitable or unfair either to the debtor or to other creditors; there is no suggestion that he threatened that unless the debtor would pay something extra he would bring bankruptcy proceedings.

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[3] (1901) 83 L.T. 754.

[4] [1928] Ch. 199.

[5] [1900] 2 Q.B. 316.

[6] [1928] Ch. 199.

[7] [1904] 1 K.B. 94.

[8] [1928] Ch. 199.

[9] [1911] 2 K.B. 658.

Extortion cannot be divorced altogether from a consideration of the motive of the creditor: *In re Shaw.*[10] Here the creditor was not using the jurisdiction of the court to obtain something to which he was not entitled; to do that would be an abuse of the process of the court. He was merely anxious that the debt should be paid. An attempt to reach agreement with the debtor and to save him from bankruptcy proceedings, as in the present case, involves no motive of extortion. It would be unrealistic to find such a motive where a solicitor who obtains a judgment in favour of the creditor, and intends to execute it, informs the debtor of his intention.

If it be decided that there was extortion in this case, no creditor will ever safely be able to negotiate with a debtor once judgment has been entered.

Duveen Q.C. in reply. It is not correct to say that a creditor would be unable to make a binding agreement with the debtor with regard to the payment of the debt once judgment had been obtained without being at risk of being found guilty of extortion, for the ordinary type of arrangement would not be affected; the creditor has only to be careful not to exert undue pressure in the form of threatening bankruptcy proceedings. There is, further, nothing to prevent a binding agreement being reached to discharge the original debt without new consideration: *Central London Property Trust Ld.* v. *High Trees House Ld.*[11] It is not extortion merely to hurry the debtor to pay by saying that bankruptcy proceedings will be brought, but there is extortion if the creditor demands something extra as the price of not taking bankruptcy proceedings. Here the creditor took advantage of the debtor's difficulties to exact payment of solicitor and own client costs to which he was not entitled. It is not correct to say that the debtor offered to pay the costs. The demand originated with the creditor. It is not relevant to consider how much was extorted; there may be extortion where the benefit is trifling in comparison with the debt.

Cur. adv. vult.

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[10] 83 L.T. 754.

[11] [1947] K.B. 130; 62 T.L.R. 557.

March 17. The following judgment was read.

EVERSHED M.R. The judgment I am about to read is the judgment of the court. Upon this appeal by the debtor against a receiving order made against him by Mr. Registrar Bowyer on December 6, 1954, the only point raised on the debtor's behalf in this court (as it was before the registrar) was that the petitioning creditor, having been guilty of "extortion" or attempted "extortion" in regard to the judgment debt obtained by him against the debtor, is now disqualified from obtaining a receiving order founded upon that judgment debt. The judgment was obtained on September 9, 1954, and was for a sum of £800 for money lent plus £12 5s. for costs. There was a question raised in the court below as to a further sum of £40, payment of which, it was suggested, the petitioning creditor had attempted improperly to extort from the debtor. It was, however, admitted before us that the debtor had at all material times in fact owed this further sum to the petitioning creditor. It was not, therefore, argued in this court that there had been any extortion in regard to the £40 and we can henceforth disregard it. The extortion contended for by Mr. Duveen on the debtor's behalf was exclusively related to the debtor's promise to pay, or the petitioning creditor's attempt to obtain, in the circumstances later specified, a further sum of £8 15s. for costs, representing the difference between the full amount of legal costs which the petitioning creditor had incurred in obtaining his judgment and the amount of £12 5s. the party and party costs awarded by the judgment.

Since, on the view which we take, this case, as every other like case, must depend upon its own particular facts, it is necessary to relate those facts fully and precisely.

The proceedings in which the judgment was obtained had been initiated by specially indorsed writ, issued on August 9, 1954, in the Queen's Bench Division of the High Court, claiming, as we have said, the sum of £800 for money lent and costs. The writ was served on the debtor on August 20. The next event was that on August 31 the debtor, of his own motion, called upon the petitioning creditor's solicitors and saw a Mr. Farrell, a managing clerk in their employ. What occurred at that interview is narrated in Mr. Farrell's affidavit made in the present proceedings, and there has been no challenge of the accuracy of Mr. Farrell's evidence. We attach, as will later appear, great importance to this evidence, and therefore read paragraph 3 of the affidavit substantially in full. It ran as follows: "On August "31, 1954, the debtor called at 14, Norfolk Street and was seen "by me. He informed me that he wished to discuss the question "of his indebtedness to the petitioning creditor. He admitted "to me that although only £800 was claimed in the writ of "summons 1954 F. No. 1354, with which he had been served "on August 20, 1954, he owed a total of £840 to the petitioning "creditor. He informed me that he wished to pay not only the "£800 claimed on the writ, but the debt of £40 in addition "thereto. He told me that he was not able to pay £840 down, "but wished to pay the debt by instalments. He said that a "company, Hingeless Products Ld. of which he was a director "and whose shares were all held by either himself or his wife "was entitled to receive from another company, Thurloe Holdings "Ld., commission which was payable to Hingeless Products Ld. "monthly, in respect of sales of hingeless spectacle frames. He "told me he did not know precisely the amount that would be "paid in the coming months because the amount varied according to the sale of the frames. He proposed that he should "arrange for Thurloe Holdings to pay to the petitioning creditor "the money that would otherwise be paid to Hingeless Products "as commission and assured me that Hingeless Products would "be willing to agree to this arrangement. I told the debtor "that before my firm could advise their clients regarding his "proposal, inquiries into the standing of the companies concerned would have to be made and into the agreement subsisting between Hingeless Products and Thurloe Holdings and "that, if my firm's clients were to allow him to discharge his "indebtedness by instalments, they might require that he discharge in addition to his debt of £840 all the costs that the "petitioning creditor had had to incur over the matter. The "debtor said that he would be willing to pay these costs if the "petitioning creditor required it. I then asked him to put his "proposal in writing and send it to my firm. He agreed to do "this and said that he would produce: (*a*) The agreement under "which Thurloe Holdings paid commission to Hingeless "Products; (*b*) A letter from Hingeless Products authorizing "Thurloe Holdings to supply information to the petitioning "creditor, and (*c*) A letter signed by all the directors of Hingeless "Products intimating that they would agree to assign to the "petitioning creditor the full benefit of the agreement between "Hingeless Products and Thurloe Holdings until such time as "the indebtedness of the debtor together with the costs had "been satisfied. I said that my firm would take instructions "from their clients as soon as they were in a position to advise "them on the matter, but that my firm's instruction did not "permit them to delay issuing a summons for judgment under "R.S.C., Order XIV."

It will be observed that the debtor's proposal was that the amount owing by him should be paid by instalments and that the petitioning creditor should accept certain sums to which Hingeless Products Ld. were said to be from time to time entitled in or towards satisfaction of the instalments. It will be observed further that the debtor, upon being informed that the petitioning creditor "might" require an indemnity as to the costs to which he had been put as a term of agreeing to accept payment in the way proposed (without any interest), at once expressed himself as willing to pay such costs. It will be observed finally that no mention of bankruptcy proceedings was made from first to last. A summons for judgment had not then been issued, but Mr. Farrell informed the debtor, at the end of the interview, that his instructions required him to proceed to judgment in any event.

On the following day the debtor wrote to the petitioning creditor's solicitors as follows: "With reference to our interview "of yesterday regarding the settlement of your clients' claim I "confirm that I have made the following proposal. I shall make "all arrangements you require with Messrs. Thurloe Holdings "Ld., of 15, Whitehall, S.W.1., that all future payment due in "respect of commission regarding the hingeless spectacle frames "shall be made to you direct until the full amount of your clients' "claim and costs are fully met. In consideration of the above "you will be good enough to let me have your undertaking to "discontinue further proceedings. I trust that my proposal will "receive your favourable consideration and on your acceptance "I shall be pleased to supply further details and produce all "necessary documents."

It will be noticed that the debtor did not then produce the documents he had been asked to produce, but that he expressed in his letter his conditional readiness to "produce all necessary "documents."

On September 2 the summons for judgment was issued; and on the same day the petitioning creditor's solicitors wrote to the debtor. Having regard to its importance this letter must also be read at length. It will be noticed that bankruptcy proceedings are twice referred to: "We have considered your "letter of September 1 and the proposals contained therein "whereby it is your intention to discharge your indebtedness to "our client company. We must make it quite clear at this stage "that there is no possibility of discontinuing the proceedings "and that our instructions are to obtain judgment against you "without further delay, and that is the course which we are "pursuing. If, when judgment has been obtained, we are in "a position to submit a reasonable proposal to our clients "whereby the judgment may be satisfied without recourse to "bankruptcy proceedings we are, of course, prepared to take "instructions thereon.

"Our instructions at this stage are absolutely specific and "unless we have a really satisfactory alternative to submit, we "see no reason why we should trouble our clients for any "variation. Nevertheless, we are prepared to explore such "proposals as you may care to make on the distinct understanding that our so doing will not prejudice our clients' "eventual decision in any way whatsoever.

"The statements in your letter under reference are not "sufficiently definite for us to advise our client on the position "and, in order that we may do so, will you please let us have "the following at your earliest convenience.

"1. The original or a certified copy of the existing agreement "between Hingeless Products Ld. and Thurloe Holdings Ld. "In the event of your sending us the original, we undertake its "safe custody and return to you in due course.

"2. A letter of authority from Hingeless Products Ld. "addressed to Thurloe Holdings Ld. requesting and authorizing "them to supply us with such information relating to the agreement as we may reasonably require.

"3. A letter signed by all the present directors of Hingeless "Products Ld. intimating that they are prepared to assign to us "or to our clients the full benefit of the agreement between "themselves and Thurloe Holdings Ld. until such time as your "indebtedness to Messrs. F. A. Dumont Ld. (together with all "costs on a solicitor and own client basis) have been satisfied.

"On receipt of the above documents we will consider the "matter further, but we must warn you that our instructions "are to issue a bankruptcy notice as soon as judgment has been "obtained and there is consequently very little time available."

The debtor thereupon for the first time consulted solicitors—a firm, in fact, highly experienced in this class of work. By letter dated September 6 these solicitors informed the petitioning creditor's solicitors that the debtor did not propose to defend the pending proceedings and in substance repeated the proposal made by the debtor to Mr. Farrell, including the fact that he was "also prepared to pay your reasonable costs in the matter." The letter included the sentence, somewhat ominous in retrospect, "Our client is very anxious not to be made a bankrupt." Mr. Duveen conceded (clearly rightly, in our judgment) that by "reasonable costs" in the letter last cited was meant the same thing as proper solicitor and own client costs.

Some further correspondence, which we need not read, passed between the solicitors on the details of the proposed payments. On September 9 judgment was obtained. On September 13 Mr. Farrell telephoned to the debtor's solicitors and spoke to a partner in the firm. The latter took the precaution of having the entire conversation recorded, and a note of it appears in the exhibited bundle of correspondence. As appears from the note, the petitioning creditor was unwilling to accept the instalments proposed by the debtor. The creditor asked instead for £440 down (that figure including the admitted £40 above mentioned) "plus "our costs" and two instalments on stated future dates, but without any interest. The dialogue concluded as follows: "What "are your costs? Well, we can agree those, can't we? You had "better tell me what you want so that I can inform the client. "Well, 20 guineas. Well, you had better put it in writing. All "right, we will write to you without prejudice. Do you still "want security? No, we don't want any security; our client "wants the money."

Again no point has been taken on the debtor's part as to the propriety of the sum of 20 guineas as a figure for solicitor and own client costs.

On the same day the debtor's solicitors wrote to the solicitors for the petitioning creditor stating that the debtor was unable to improve upon his former offer. "He thinks . . ." they said, "that your clients are very unreasonable. . . . These demands "our client, in view of the fact that he must either comply with "these or submit to the indignity of bankruptcy proceedings, "has done his very best to comply with and not only that, in "our letter to you of September 6 he promised an immediate "payment of £240 as he could have provided for the two cheques "if your clients had agreed to allow you to re-present them.

"He, on our advice, submitted to judgment and now your "clients want £440 down and £21 for costs, £200 on October 15 "and £200 on November 30, and, not only that, they want

"£440 and the £21 costs within 48 hours, although we suggested "72 hours.

"You will bear in mind that the order for judgment is for "£800 only and for £12 5s. costs although our client offered to "pay a further £40 for which he is morally, but not legally, "liable.

"The position now is that our client can do no more than "he has offered to secure your clients in the best possible way. "In these circumstances if you insist on proceeding in bankruptcy our client will attend here to be served with such "documents as you deem proper to serve upon him. It does, "however, occur to us to ask you to reconsider the matter."

The petitioning creditor's solicitors also wrote on September 13 to the debtor's solicitors confirming the telephone conversation. Save for the reference to the mention made of them in the telephone conversation the letter made no mention of costs, but was devoted to justifying the added claim, now conceded, for £40. The only reference to bankruptcy proceedings was: "We advised our clients that they would be in a position, "in the event of bankruptcy proceedings ensuing, to prove for "the balance of £40."

The next event was that on September 15 a bankruptcy notice was issued, founded on the judgment debt, including costs, of £812 5s. On September 20 the petitioning creditor's solicitors telephoned to the debtor's solicitors stating that their client was prepared to accept modified terms—to the debtor's advantage—as regards the instalments, and these modified terms were later on the same morning repeated when a representative of the petitioning creditor's solicitors called upon the debtor's solicitors. As the terms were not acceptable to the debtor, the bankruptcy notice was thereupon served. These last-mentioned terms did not contain any alteration of the proposals previously made as to costs.

No further matters of fact are relied upon by the debtor in support of his allegation of extortion. The bankruptcy notice expired on September 28 and the petition was presented on October 21, 1954.

It was the contention of Mr. Duveen, for the debtor, that upon these facts the petitioning creditor must be treated as guilty of "extortion," as that word is understood in bankruptcy law, and, therefore, disqualified from obtaining a receiving order upon his petition, and not only that, but also disqualified for all time from founding a bankruptcy petition upon his judgment debt against the debtor. It was conceded by Mr. Stable, for the petitioning creditor, that if, in truth, the company had been guilty of " extortion " in the bankruptcy sense, it was so disqualified. The penalty, then, is severe. The judgment obtained by the petitioning creditor on September 9, 1954, is, if " extortion " be established, for ever tainted in the creditor's hands, however justly obtained and whatever be the circumstances relating to it, so far as bankruptcy proceedings are concerned. No subsequent conduct on the part of the petitioning creditor or of the debtor can remove the taint. So far as this judgment debt is concerned the debtor, through no act or virtue of his own, is for ever immune from bankruptcy proceedings (properly so called) at the suit of the petitioning creditor, to whom the doors of the court in the exercise of its bankruptcy jurisdiction as regards this judgment debt are for all time closed.

So far-reaching a result would appear at least surprising if (as is in the present case conceded) no degree of moral turpitude, no kind of bad faith, no oppression, as that word is ordinarily understood, attached to the conduct of the petitioning creditor. Yet the argument of Mr. Duveen so demands and requires.

In the circumstances it is, in our judgment, necessary to examine closely the basis of the argument and to discover what are in truth the characteristics of " extortion " as understood in bankruptcy law and what is the justification for the intervention of the court where " extortion " is found to have taken place.

It appeared at one stage during the argument that the basis and justification of the decisions as to extortion might be that, once a creditor had invoked or threatened to invoke the bankruptcy jurisdiction, he was irrevocably committed to an equal distribution of the debtor's assets among his creditors, so that any step or action thereafter on the part of the creditor which was calculated to result, or might result, in his obtaining rateably more in respect of his debt than other creditors amounted to extortion. No doubt anything done or proposed by the debtor designed to secure for the creditor, in the bankruptcy, more than his proper share of the assets would be vicious and tainted. The case of *In re Shaw* [1] was such a case; for there the creditor had proposed, as a term of his consenting to the composition of 10s. in the £ which the other creditors had approved, a scheme whereby he would in fact have received more than 10s. in the £

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[1] (1901) 83 L.T. 754.

C. A.
1955

MAJORY, *In re.*

in respect of his debt. The scheme involved, in other words, a plain fraud upon the other creditors.

Nothing of that kind enters into the present case. Attempted frauds upon the other creditors require no further consideration. The court will clearly not, in the exercise of its discretion under section 5 (3) of the Bankruptcy Act,[2] make a receiving order at the suit of one who has attempted such a fraud.

Mr. Duveen conceded in his reply that the rule as to extortion which he sought to invoke did not rest upon any such general proposition as above suggested, namely, that a creditor invoking or threatening to invoke the bankruptcy jurisdiction was irrevocably committed to equal distribution in all circumstances; and, in our judgment, he plainly was right so to concede. On any other view a creditor who had served a bankruptcy notice in respect of a judgment debt and who had reason to suppose that the debtor's assets were insufficient to pay all his creditors in full could not safely accept payment in full of his debt according to the terms of the bankruptcy notice itself. Moreover, such a proposition would be inconsistent with the case in this court of *In re Bebro*,[3] hereafter considered. For the effect of that case was that, as a result of the terms made between the creditor and the debtor for the withdrawal of the former's first petition, the amount was increased of the debt on which the first petition had been based; and, on this view, it could not matter that the increase in the amount of the petitioning creditor's debt had arisen from a wholly voluntary offer on the debtor's part. At most, the general nature and purpose of the bankruptcy jurisdiction, including its effect on the status of the debtor, forms the background against which an allegation of "extortion" must be judged. In our view the observation of Lord Hanworth M.R. in *In re a Debtor* (*No.* 883 *of* 1927),[4] "The whole principle of "bankruptcy is that when an act of bankruptcy has been com"mitted there shall be a fair distribution between all the "creditors" must be so judged.

But Mr. Duveen's case was that anything done, or any agreement or arrangement made, by a creditor under the shadow or threat of bankruptcy proceedings whereby the creditor might obtain from the debtor a penny piece more than the sum "to "which he was legally entitled" amounted to extortion within the meaning of bankruptcy law even though there was no true element present of impropriety or oppression, as those words are commonly understood.

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[2] Bankruptcy Act, 1914, s. 5 (3): "If the court is not satisfied with the "proof of the petitioning creditor's "debt, or of the act of bankruptcy, or "of the service of the petition, or is "satisfied by the debtor that he is able "to pay his debts, or that for other "sufficient cause no order ought to be "made, the court may dismiss the "petition."

[3] [1900] 2 Q.B. 316.

[4] [1928] Ch. 199, 208.

In our judgment, such a proposition is too widely stated and cannot be justified by the decided cases; for it appears to us to involve the assertion that any sum which a debtor may agree to pay over and above the actual amount of the judgment debt is a sum "to which the creditor is not legally entitled," and which he is presumed in law to have exacted from the debtor by bankruptcy proceedings or the threat thereof, whatever be the circumstances in which the debtor may have agreed to pay such additional sum. No doubt, where a creditor has, for example, agreed to accept payment of his debt in instalments, a sudden demand on his part for his solicitor and client costs, without any consideration, as a term of not proceeding upon a bankruptcy petition would properly be regarded as extortion. *In re a Judgment Summons (No. 25 of 1952); Ex parte Henlys Ld.*[5] was such a case, though this court in fact deliberately expressed no view upon that particular matter. And any demand by a creditor to be paid a full indemnity as to costs over and above his ordinary party and party costs is very likely to be regarded with great suspicion where the threat of bankruptcy is present; but a creditor may perfectly well and properly, we conceive, after judgment and before bankruptcy proceedings have been initiated or threatened, make terms with his debtor to accept payment of his debt by instalments or otherwise upon terms advantageous to the debtor; and may as consideration for the concession which he makes say to the debtor: "If I am to "wait for payment or if I am to accept some form of substituted "security, at least you must indemnify me against the legal "expenses to which you have put me." Such a bargain, at least if made before any threat of bankruptcy proceedings, would, prima facie, be both proper and enforceable, and any reasonable additional sum which the debtor thereby engaged himself to pay for costs could not, in our judgment, be described as a sum to which the creditor "was not legally entitled." Were it otherwise, indeed, as Mr. Stable pointed out, the result would be highly disadvantageous to honest debtors. Moreover, Mr. Duveen conceded that any consideration flowing from the debtor other than the promise of a money payment (for example, a reasonable covenant in restraint of trade) would not be liable to challenge. We find it, for our part, difficult to see why a promise of the one kind should be innocuous but of the other should be automatically characterized as a subject of extortion.

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[5] [1953] Ch. 1; [1952] 2 T.L.R. 681; [1952] 2 All E.R. 772; [1953] Ch. 195; [1953] 1 All E.R. 424 (C.A.).

If a comparable arrangement or promise is made or given after bankruptcy proceedings have been begun or threatened, must it merely on that account be held automatically and in all circumstances to constitute extortion on the part of the creditor? We cannot accept that view. No doubt the initiation or threat of bankruptcy proceedings, with all their quasi-penal consequences, can be a most potent instrument in the hands of a creditor, and provides, readily enough, scope for oppression; and no doubt the court will view with a jealous eye any bargain proposed or demand made by a creditor wielding such a weapon.

But the question to be considered, albeit with due regard to the unequal position of the parties, is, whether there has been oppression: whether there has been extortion, in fact. In our judgment, a sum which a debtor may for good consideration promise to pay to the creditor does not automatically and in all circumstances become a payment to which the latter is not legally entitled, and which he has exacted or attempted to exact by bankruptcy proceedings or the threat thereof, merely because such proceedings have been initiated or threatened, and nothing in the decided cases compels us so to hold. Nor, in our judgment, do the decided cases warrant the conclusion that "extortion" in bankruptcy has a special significance altogether divorced from the proper and ordinary meaning of the word.

In *In re G.*[6] the creditor had made terms for the withdrawal of his first petition which included a sum of £20 being added as a "bonus" to the debt. He later obtained judgment in respect of the balance of the original debt so increased and sought to invoke bankruptcy proceedings upon that judgment. It was held that he could not be allowed so to do. Lindley M.R. is reported to have said: "When we look behind the judgment in "this case we find that the second promissory note was sub"stantially, to some extent, obtained by extortion based on an "abuse of the bankruptcy process." The case is very shortly reported, but in the later case in the same year of *In re Bebro*,[7] Rigby L.J., who was a member of the court in *In re G.*,[8] said of it[9]: "There the registrar had in fact come to the conclusion

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[6] (1900) 44 S.J. 345.

[7] [1900] 2 Q.B. 316.

[8] 44 S.J. 345.

[9] [1900] 2 Q.B. 316, 322.

"that there was extortion; and, speaking for myself, I may "say—and I think I am not wrong in saying that my opinion in "that case was shared by the other members of the court—that "we thought we could not possibly take a different view from "that which the registrar had taken; and we proceeded on that "ground only, namely, that there had been de facto extortion."

In *In re Bebro*[10] the decision went the other way. Mr. Duveen claimed that the case was one of very special facts in that the terms on which the first bankruptcy petition presented by the creditor had been withdrawn had included a promise by the debtor to pay a sum for costs over and above the amount in respect of which the original petition had been presented, such promise having, according to the report, been entirely voluntary on the debtor's part without any pressure from the creditor, who had expressed himself as willing to take no more than the amount of the original judgment debt. No doubt, if the facts were as we have stated them, the case was unusual; but we refer to certain passages in the judgments for the principle which they contain. Thus, Webster M.R. said[11]: "But the matter has "been put by Mr. Reed" (the counsel for the debtor) "on the "higher ground that, although on the evidence the transaction "might not be one of extortion but based merely upon the earnest "solicitation of the debtor, yet if the result was that the creditor "obtained a larger amount than he would have got under the "bankruptcy proceedings, that would in law be extortion. "Agreeing with the learned registrar, as I do, upon the facts, that "there was no extortion exercised by the petitioning creditor, and "that the request came from the debtor himself, and believing, as "the registrar believed, that the petitioner was willing to take "his money without interest—or that at any rate he brought no "pressure upon the debtor in order to get a larger amount—I "think Mr. Reed's argument must go this length, that if the "result of the proceedings is that the petitioner got a larger "amount than he would have got under the bankruptcy proceed"ings, they cannot stand. I think the true view is that taken "by Fry L.J. in *In re Atkinson*, where he says[12]: 'In my "'opinion, the moment the court sees the petition is made a "'means of extorting money, a petitioner should not be able to "'get a receiving order.' I quite agree that it by no means "follows that because the solicitation came in the first instance

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[10] [1900] 2 Q.B. 316.

[11] Ibid. 320.

[12] (1892) 9 Morr. 193, 196.

C. A.

1955

MAJORY,
In re.

"from the debtor there can be no extortion: because, as my "brother Rigby L.J. has already pointed out, it might well "be that, in his answer to the request of the debtor, the "petitioner did in fact put very considerable pressure upon the "debtor; but the court must be satisfied that the bankruptcy "proceedings have been used to extort or get from the debtor a "larger amount than the creditor could have lawfully received by "means of the proceedings. I quite agree with Mr. Reed's "argument that if extortion is once proved the machinery by "which it has been effected, whether by getting an adjournment "or a dismissal of the petition, makes no difference. If the "process of the court has been used improperly, that is enough "to vitiate the arrangement."

After referring to *In re G.*[13] Webster M.R. said[14]: "I see "nothing to justify the argument in the present case that any "bona fide proceedings to get payment from the debtor without "undue pressure should be treated as extortion merely because "the debt which forms the foundation of a subsequent bankruptcy proceeding is for a larger amount than the petitioning "creditor would have obtained under the petition originally "presented."

We have already referred to one part of the judgment of Rigby L.J. He concluded his judgment as follows[15]: "Each "case must be carefully examined into, and the court must "decide upon the facts arising out of such examination."

Finally Collins L.J. said[16]: "Here it is shown that there has "been no extortion. The registrar has found that the pressure, "if there was any, came from the debtor and not from the "creditor, and so there has been no extortion at common law. "The cases cited by Mr. Reed went on a larger principle, which "I do not think has as yet been applied to cases like that now "before us."

We have already mentioned *In re Shaw.*[17] The case was entirely different from the present, being one where the creditor had attempted to perpetrate a plain fraud upon the other creditors. But we find the language of Rigby L.J. once more of considerable assistance. He said[18]: "Now, it was admitted, "and could not be denied, that if a creditor goes to his debtor "and says: 'You owe me so much, I can proceed in bankruptcy "'against you; you will not like that; pay me something

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[13] 44 S.J. 345.

[14] [1900] 2 Q.B. 316, 321.

[15] Ibid. 323.

[16] Ibid. 324.

[17] 83 L.T. 754.

[18] Ibid. 755.

" ' extortionate, something altogether beyond what you owe me at " ' law, or I will file a petition,' that petition cannot be made the " basis of a receiving order; and very properly, for though the " petition itself will only be that which is within the right, so " far as there is a right, of a creditor, and will only have the " effect of distributing the property according to the rules of " bankruptcy, yet the previous conduct of the creditor would " make it plain that he was using, or attempting to use, the " bankruptcy proceedings as a means of unduly extorting what " was not due to him."

But Mr. Duveen relied most strongly (and very naturally) upon *In re a Debtor* (*No.* 883 *of* 1927).[19] Although each of the members of the court were careful to say that they were not moved by sympathy for the debtor, yet it is quite plain that they thought that the conduct of the creditor had been, to say the least, of a most harsh character. The debtor, who was an articled clerk to a firm of solicitors and without means, had been persuaded to provide the creditor with a cheque for £500 in respect of an underwriting transaction in the belief that funds would be provided from another source to satisfy any obligation which might fall upon him. The debtor having failed to meet the cheque, judgment was obtained upon it by the creditor, who then proceeded to initiate bankruptcy proceedings. The letter from the creditor's solicitors (of which Lord Hanworth M.R. said that he could well understand the indignation which it would create in the minds of those who received it) is set out in the report,[20] and the substance of it was that the creditor said that he would agree to adjournment or withdrawal of the petition only upon terms including that the debtor should pay, in addition to the amount of the judgment debt and interest, the difference between the creditor's solicitor and own client costs and the party and party costs obtained on the judgment and also the solicitor and client costs incurred by the creditor in an action against a third party, these costs amounting in all to some £160. The debtor did not accept the proposed obligation as to costs, but he in fact made an instalment payment which was treated as including the difference between the costs incurred by the creditor in his proceedings against the debtor upon a full indemnity basis and a party and party basis. The creditor withdrew his original petition but subsequently brought further bankruptcy proceedings in respect of the outstanding balance of his debt. It is not surprising that this court regarded the demands which the creditor had made in respect of costs as both extortionate and improper in the extreme.

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[19] [1928] Ch. 199.

[20] Ibid. 200, 201.

Mr. Duveen contended that the reasoning in the judgments showed that the debtor's agreement to pay and payment in fact of the excess of solicitor and client costs over party and party costs in respect of the judgment obtained against him would of itself have been treated as evidence of extortion sufficient to disqualify the creditor, apart altogether from the other terms which the creditor had sought to impose upon the debtor: in other words, Mr. Duveen claimed that *In re a Debtor*[21] was authority for his proposition that the obtaining of a promise by a debtor to pay solicitor and client costs as a term of acceptance of the debt by instalments or otherwise than in strict accordance with the terms of the judgment was ipso facto extortion within the meaning of bankruptcy law. We cannot so read the judgments of this court: and we think indeed that, if they could be so read, they would be inconsistent with the reasoning in the earlier cases, and particularly with the judgments in *In re Bebro.*[22]

We quote, in the circumstances, at some length from the judgments. Thus, Lord Hanworth M.R. said[23]: "The "petitioners were not entitled to recover solicitor and client costs "against the debtor, and there was no shadow of foundation for "a claim against the debtor in respect of the costs incurred by "the petitioners in these proceedings against the Sherbourne "Trust, Ld. The petitioners were therefore attempting, as the "price of the dismissal of the petition and the adjournment for "an uncertain time of further proceedings against the debtor, "not only to obtain payment of a sum on account of the debt, "and a guarantee in respect of the balance, but also to obtain "payment by the debtor of someone else's debt and of some "costs which he was under no liability to pay.

"I do not hesitate to characterize that demand as most "improper. Those who are engaged in bringing bankruptcy "proceedings must take care that their proceedings do not "constitute an abuse of the process of the court; and to make "a demand of this nature was to attempt to extract from the "debtor, who was in a most difficult position—he had explained "in his letter of February 28, 1927, that the ruin of his future "career was involved—costs of an amount in excess of his

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[21] [1928] Ch. 199.

[22] [1900] 2 Q.B. 316.

[23] [1928] Ch. 199, 205.

"liability and further costs for which he was under no liability, "being costs for which the Sherbourne Trust, Ld., were liable, "and an amount in excess of what the Sherbourne Trust, Ld., "were liable to pay."

Later he said [24]: "As I have already said, the debtor ought "to be made a bankrupt, and in the ordinary course the receiving "order would have been a perfectly right order to be made by "the registrar; but there is a principle which must be jealously "guarded—namely, that the process of the bankruptcy court "must not be abused."

Then, finally, after referring to earlier cases, including those of *In re Shaw* [25] and *In re G.*,[26] he said [27]: "It is said here that "all that was done was that some £15 was obtained from the "debtor in respect of costs which he did not owe, costs which "were the difference between party and party costs and solicitor "and client costs. That is not an accurate way of putting it; the "attempt was to obtain not only those costs but also a further "sum of £160 in respect of costs which the debtor had no "concern with at all." There followed the short passage about fair distribution which I have earlier cited. Sargant L.J. said [28]: "I now come to what appears to me to be the ground on which "the appeal succeeds. It relates to the action of the petitioning "creditor in obtaining a sum of £15 in excess of the costs to "which he was legally entitled, and, what is much more important, the attempt to obtain £160 for costs as between "solicitor and client in respect of a matter for which the debtor "was in no way liable. To my mind, that was a demand which "comes within the phrase 'extortion,' as it has been used in "the cases to which the Master of the Rolls has referred and "to which I will not refer again."

Sargant L.J. observed subsequently [29]: "To my mind the "attempt to obtain so large a sum as £160 for costs due from "some other person for which the debtor could not by any "stretch of imagination be deemed to be personally liable, was "a very strong instance of an attempt to use bankruptcy "proceedings—the threat of bankruptcy—for the purpose of "obtaining a collateral advantage unconnected with the bankruptcy for the benefit of the petitioning creditor." It is plain, in our view, that the gravamen of the charge of extortion was, in the view of Sargant L.J., related to the demand for £160 for costs in the proceedings against a third party.

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[24] [1928] Ch. 199, 206.
[25] 83 L.T. 754.
[26] 44 S.J. 345.
[27] [1928] Ch. 199, 208.
[28] Ibid. 209.
[29] Ibid. 210.

Finally, Lawrence L.J. stated[30]: "The debtor alleges that "there are several sufficient causes for not making the receiving "order, but the only one of any substance is that the petitioning "creditors on the occasion of the previous bankruptcy proceedings by them for the same debt attempted to extort the "payment of money for which the debtor was not liable as the "price of allowing that petition to be dismissed, and that the "attempt partially succeeded." The passage most strongly relied upon by Mr. Duveen is, however[31]: "An attempt to "do so," (that is, to use bankruptcy proceedings for the purpose of obtaining a collateral advantage) "even though unsuccessful, "will be sufficient to disentitle a petitioning creditor to an order, "and, therefore, the fact that in the present case the debtor "refused to pay the costs of the Sherbourne Trust, Ld., and "that that demand was not insisted upon, does not absolve the "petitioning creditors from the consequences of having made "that demand. The principle upon which the court acts in "these cases is that it treats a demand of this nature as evidence "that bankruptcy proceedings were taken not with the bona fide "intention of obtaining adjudication but for some collateral "purpose.

"As regards the demand for solicitor and client costs in the "action against the debtor, I agree with Mr. Fortune that it "stands on a somewhat different footing, but it has this vice "in it, that it was a demand for a sum for which the debtor "was not legally liable, and that demand was acceded to and "has, to a certain extent, succeeded. If these demands had "been made in the proceedings now before the court, then "speaking for myself I should have had no hesitation in declining "to make a receiving order upon the petition."

It is this last cited passage which seems at first sight most strongly to support Mr. Duveen's contention. In spite, however, of the paragraph break which appears in the report, we feel no doubt that Lawrence L.J. was not purporting to consider the sum of £15 solicitor and client costs in isolation and to be expressing an opinion upon what would have been the result of a case different from that which was before the court. The vice of the conduct of the creditors lay in the whole nature of their demand and the use they sought to make of the threat of bankruptcy proceedings to obtain from the debtor substantial sums for which in other circumstances he could not possibly have been asked to render himself liable.

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[30] [1928] Ch. 199, 211.

[31] Ibid. 212.

Lawrence L.J. concluded his judgment[32]: "Applying the "underlying principle of all those cases to the present case, it "seems to me to be clear that the creditors here have utilized "bankruptcy proceedings for the purpose of extorting, or "attempting to extort, money from the debtor for which the "debtor was in no sense liable. In other words, the petitioning "creditors have utilized bankruptcy proceedings for a collateral "purpose, and that is a thing which the court does not allow."

In *Ex parte Henlys Ld.*[33] the question was whether the taint of extortionate conduct on the part of a creditor would extend to disqualify him, not only from obtaining a receiving order in respect of the tainted debt, but also from proceeding to enforce the debt by way of judgment summons. This court being of opinion that the disqualification did not in any event so extend, the question with which we are concerned was not material for this court's decision; and, as we have already said, the court deliberately avoided expressing any opinion one way or the other whether, on the facts of the case, there had been extortion.

Harman J., who had been of opinion that the disqualification did extend to proceedings by way of judgment summons, had held that the case was one of extortion. The relevant facts were that after a creditor had agreed to accept payment of his debt by instalments he sent a sudden and peremptory demand for payment of his solicitor and client costs in addition, with the obvious purpose and intention of using the bankruptcy proceedings as a means of getting these extra costs paid by the debtor. As Jenkins L.J. said in this court[34]: "It is also plain from the "peremptory terms of the demand for the 12 guineas con-"tained in their letter of November 22, that this was precisely "the impression which the judgment creditors' solicitors "intended to produce, or, in other words, that they were using "the threat of bankruptcy proceedings based on the notice of "November 16 as a means of exacting payment of the 12 "guineas."

In the first court, Harman J. had, in the course of his judgment, used this language[35]: "Of course, in many of these cases

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[32] [1928] Ch. 199, 213.

[33] [1953] Ch. 1; [1953] Ch. 195 (C.A.).

[34] [1953] Ch. 195, 201.

[35] [1953] Ch. 1, 5.

"there is extortion in the ordinary sense—unconscionable "demands of various kinds—but the term in bankruptcy has a "wider meaning and includes matters in which little, if any, "moral obliquity is involved. In this case the solicitors "demanded the sum of costs because they were ignorant of "bankruptcy rule or bankruptcy practice, and I do not accuse "them or their clients of any great moral obliquity, and nobody "suggested that there was any. The principle exists nevertheless that the threat of the penal sanction of bankruptcy must "not be used to obtain a collateral advantage of any kind."

We venture, for our part, to disagree with the learned judge if, by his language, he meant to imply that extortion in bankruptcy has a wholly special and artificial significance divorced altogether from the ordinary sense of the word. We agree, however, with his statement of the principle that the "penal "sanction of bankruptcy must not be used to obtain a collateral "advantage."

Jenkins L.J., in this court, similarly stated the principle[36]: "The object of proceedings in bankruptcy is to make the debtor's "assets available for rateable distribution amongst his creditors. "No creditor is entitled to have recourse to such proceedings "for the purpose of obtaining some collateral advantage for "himself. Moreover, the threat of bankruptcy, with the "deprivation of property and status which it involves, may be "a potent instrument of oppression and of 'extortion' in no "mere technical sense. These, in effect, are the considerations "dwelt on in the authorities to which I have referred, and they "amply account for the strictness of the rule against 'extortion' "which has been laid down and firmly maintained by the courts "in bankruptcy, and for the penalty for breach of that rule "which it has been found necessary to provide in the shape of "disqualification from founding any subsequent bankruptcy "proceedings upon any debt in relation to which a charge of "'extortionate' conduct has been made good."

We add only that, as the Lord Justice later observed,[37] extortionate conduct will in the given circumstances be shown even though the collateral benefit obtained is trifling in comparison with the amount of the debt.

We conclude our citations from the cases by a reference to the judgment of the Privy Council delivered by Lord Watson in *King* v. *Henderson*.[38] In that case the Board held that it was not an abuse of the process of sequestration that the creditor had been actuated, not only by a desire to obtain payment of the debt, but by his knowledge that the result of a sequestration order would be automatically to exclude the debtor from a partnership firm. Lord Watson, however, stated the general principle as follows [39]: "Their Lordships do not dispute the "soundness of the proposition that a plaintiff or petitioner who "institutes and insists in a process before the bankruptcy or "any other court, in circumstances which make it an abuse of "the remedy sought or a fraud upon the court, cannot be said "to have acted in that proceeding either with reasonable or "probable cause. But, in using that language, it becomes "necessary to consider what will, in the proper legal sense of "the words, be sufficient to constitute what is generally known "as an abuse of process or as fraud upon the court. In the "opinion of their Lordships, mere motive, however reprehen-"sible, will not be sufficient for that purpose; it must be shown "that, in the circumstances in which the interposition of the "court is sought, the remedy would be unsuitable, and would "enable the person obtaining it fraudulently to defeat the rights "of others, whether legal or equitable."

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[36] [1953] Ch. 195, 212.

[37] Ibid. 214.

[38] [1898] A.C. 720; 14 T.L.R. 490.

From these citations the following conclusions, which we have already earlier intimated, may in our judgment be drawn:

(1) There is no such hard and fast rule as Mr. Duveen suggested, namely, that any arrangement or agreement made by a petitioning creditor with his debtor, after the institution or under the shadow of bankruptcy proceedings, whereby the creditor is able to get more than that "to which he was legally "entitled" (that is, more than he could have recovered at law at the time of the bankruptcy proceedings being started or threatened) amounts to extortion in bankruptcy law notwithstanding the absence of any mala fides or anything amounting to oppression in fact. In our judgment, the decision in *In re Bebro* [40] involves necessarily the rejection of such proposition.

(2) There is equally no rule that extortion has in bankruptcy law a special and artificial significance divorced altogether from the ordinary implication of the word.

(3) The so-called "rule" in bankruptcy is, in truth, no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral

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[39] [1898] A.C. 720, 731.

[40] [1900] 2 Q.B. 316.

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advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused.

(4) On the other hand, having regard to what Jenkins L.J. called [41] "the potent instrument of oppression" which bankruptcy proceedings (with their potential consequences upon property and status) provide, the court will always look strictly at the conduct of a creditor using or threatening such proceedings; and if it concludes that the creditor has used or threatened the proceedings at all oppressively, for example, in order to obtain some payment or promise from the debtor or some other collateral advantage to himself properly attributable to the use of the threat, the court will not hesitate to declare the creditor's conduct extortionate and will not allow him to make use of the process which he has abused.

(5) In every case it is a question of fact in all the circumstances of the case whether there has been, in truth, extortion.

In the above tabulation we have not specifically referred to those cases—a distinct class in themselves with which the present case is not concerned—where a creditor attempts to perpetrate a fraud upon the other creditors, though such attempts are an obvious example of abuse of the process of the courts.

It remains to determine whether, upon the facts of the present case as we have fully stated them at the beginning of this judgment, the petitioning creditor has been guilty of "extortion." If the question were put, as it were as a question for a jury, upon a consideration of all the narrated facts: is the petitioning creditor guilty of using or threatening bankruptcy proceedings at all as an instrument of oppression? we cannot think that any but a negative answer could sensibly be given.

But, if the matter be examined more in its details, then, in our view, the most significant and vital matter of fact is that the debtor's promise, if required, to pay solicitor and client costs (as a term of obtaining the creditor's acceptance of his proposal to meet the debt by instalments and by means of an assignment of the rights of Hingeless Products Ld.) was given at a time when bankruptcy proceedings had not been mentioned or hinted at by the petitioning creditor—at a time indeed prior even to the issue of a summons for judgment in the Queen's Bench action. Mr. Duveen criticized the phrases in the registrar's notes "in "view of free agreement as to costs" and "as the question of "costs was voluntary and moving from the debtor." But, even if these phrases involve an over-simplification, it is at least clear that the promise was not given as a result of any threat on the creditor's part of bankruptcy or, indeed, of any threat at all. The promise was made at an interview of the debtor's own seeking in order to see if the creditor could be persuaded to accept something less than his strict rights entitled him to require. It was not indeed until after the promise had been clearly made that the debtor was informed that the creditor would in any case proceed to judgment.

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[41] [1953] Ch. 195, 212.

And once the promise had been given, the matter of solicitor and own client costs ceased to have any real significance in the subsequent negotiations which were concerned exclusively with the amounts and times of the instalments and the question of the assignment of the rights of Hingeless Products Ld. It has been clearly and rightly conceded that the subsequent quantification and the reference to "reasonable costs" added nothing of significance to what had gone before. Though there were two references to bankruptcy in the petitioning creditor's solicitors' letter of September 2, the purpose of that letter was to ask for the more precise information which the debtor had already promised to give, and the object of the reference was, in regard to that matter, no more than to indicate urgency. It is true that the debtor's solicitors on September 6 stated the anxiety of their client to avoid bankruptcy; but the letter contains nowhere any suggestion that he was acting under the stimulus of a threat either as regards costs or otherwise. We have already said that nothing relevant turns, in our judgment, on the naming of the sum of £21 during the telephone conversation of September 13. We note, however, that the figure was given because the matter was specifically raised by the debtor's solicitors; and we think it not wholly unimportant for the purposes of the present case that from September 6 onwards the debtor was, in fact, being advised and represented by solicitors of great experience in this kind of matter. We think also, in regard to this conversation, that the final words in the record, "We don't want any security, "our client wants the money," indicate clearly, as we construe the words, that the petitioning creditor was not using the threat of bankruptcy proceedings to get a collateral advantage but was anxious only to obtain payment of his judgment debt. The letters of September 13 provide equally, in our view, no support for any allegation of extortion; and it is, in our judgment, highly significant that the debtor's solicitors in their letter of that date, though they complained of the creditor's "demand" for payment of the £40 for which, they said (quite wrongly, as is admitted), the debtor was not legally liable, made no such suggestion in regard to the costs; and the emphasis in the letter from the petitioning creditor's solicitors of the same date was upon the justification for that claim of £40 to which alone their one reference to bankruptcy was related. We do not think anything that occurred on September 20 can provide any further assistance for either side, and we do not understand that Mr. Duveen made any real point of the events of that day.

As we have earlier said, we think that a demand by a creditor for solicitor and own client costs, if made by a creditor under the shadow or threat of bankruptcy proceedings. will always, and rightly, be looked upon by the court—to say the least—with the greatest suspicion; for these costs can never, as such, be the subject of any legal claim; and a promise to pay them, even though apparently given in consideration of some concession to the debtor, will easily and readily be attributed to the threat without which the promise would never have been given. But, as we have tried to show, the promise in the present case was given when there had been no threat of bankruptcy proceedings and, in our judgment, in circumstances when no shadow of future events of that kind affected it. Thenceforward the matter of costs played no further significant part in the proceedings, at least if judged from the viewpoint of possible oppression or extortion by the creditor.

In our judgment, therefore, the registrar was right to hold that on the special facts of this case there was no extortion by the petitioning creditor. We think the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Isadore Goldman & Son; Ruston, Clark & Ruston.*

E. D.

In re CROSSLEY'S SETTLEMENT TRUSTS. CHIVERS *v.* CROSSLEY.

[1955 C. No. 663.]

1955
June 28.

Wynn-Parry J.

Entailed Interest—Settlement—Rules applicable—Abeyance of estate—Successive entailed interests to only son of settlor and subsequently born younger sons with remainder to great-nephew—Death of tenant in tail in settlor's lifetime—Disposition of intermediate income pending birth of further sons or settlor's death—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *ss.* 130 (1), 175 (1).

In 1934 Sir K. and E., the surviving sons of a deceased baronet, by a memorandum agreed to settle the sum of £50,000, to which they were entitled out of their father's estate, on the successors of Sir K. in the baronetcy. On May 21, 1949, two days before the death of E., Sir K. and E. executed a deed of settlement and appointment pursuant to that agreement.

At that date Sir K. had issue a grandson, F., the only son of his only son, who became first tenant in tail under the settlement. E. had issue C., the only son of his deceased eldest son, and two younger sons.

Clause 4 of the settlement provided that the trustees should stand possessed of certain funds (referred to as "the baronetcy "fund") (i) on trust for F. for life, if and when he should attain 21, the trust being deemed to carry the intermediate income for the purposes of section 31 of the Trustee Act, 1925, with remainder; (ii) on trust for F.'s first and other sons successively in tail male, with remainder; (iii) on trust for the subsequently born sons of Sir K. successively in tail male, with remainder; (iv) on trust for C. for life, if and when he should attain 21, the trust being deemed to carry the intermediate income for the purposes of section 31 of the Trustee Act, 1925.

In 1953 F. died without issue, and C. (then over 21) became heir presumptive to the baronetcy. Sir K. was aged 78, and had remarried. On the hearing of a summons taken out for the determination of the question how the income of the fund should be dealt with until it could be ascertained whether or not Sir K., before his death, would have a further son or sons who would take in priority to C.:—

Held, (1) that by virtue of section 130 (1) of the Law of Property Act, 1925,[1] an entailed interest in personalty created by deed since 1925 was subject to the same rules of law, statutory and otherwise, as affected estates tail in realty before 1926; so that, in accordance with those rules, intermediate income pending the birth of a person who, on being born, would be entitled in possession, was not to be accumulated; and that in those circumstances the interest of C. was to be accelerated; (2) that the same result followed from a proper construction of the settlement.

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[1] Law of Property Act, 1925, s. 130 (1): "An interest in tail or in "tail male or in tail female or in tail "special (in this Act referred to as "'an entailed interest') may be "created by way of trust in any pro"perty, real or personal, but only by "the like expressions and those by "which before the commencement of "this Act a similar estate tail could "have been created by deed (not "being an executory instrument) in "freehold land, and with the like "results, including the right to bar "the entail either absolutely or so as "to create an interest equivalent to a "base fee, and accordingly all statu"tory provisions relating to estates

ADJOURNED SUMMONS.

On January 2, 1934, Sir Kenneth Irwin Crossley and Eric Crossley, the surviving sons of Sir William John Crossley, Bt., who died in 1911, executed a memorandum of agreement to settle the sum of £50,000, to which they were entitled out of their father's estate, on the successors of Sir Kenneth in the baronetcy. Each set aside the sum of £25,000, but no settlement was then executed.

Sir Kenneth had one son, Anthony Crommelin Crossley, who died in 1939, leaving a son, Francis Patrick Irwin Crossley, who was born in 1929 and died on August 26, 1953. Eric Crossley, who died two days after the execution of the settlement referred to below, was survived by a son of his deceased eldest son and by two younger sons. The grandson, Christopher John Crossley, who was born in 1931, became the heir presumptive to the baronetcy on the death of Francis.

Sir Kenneth and Eric, on May 21, 1949, executed a deed of settlement and appointment pursuant to the previous agreement, whereby they settled the funds subject to the trusts thereof. Clause 4 of the settlement provided: "The trustees shall stand "possessed of the investments set forth in the second schedule "hereto and the property for the time being representing the "same (hereinafter called 'the baronetcy fund') upon the trusts "following that is to say: (i) upon trust for the said Francis "Patrick Irwin Crossley (the grandson of the said Sir Kenneth "Irwin Crossley and being the next in line of succession to the "baronetcy of Crossley) during his life if and when he shall "attain the age of 21 years and so that this trust shall be

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"tail in real property shall apply to "entailed interests in personal pro-"perty."

S. 175 (1): "A contingent or future "specific devise or bequest of pro-"perty, whether real or personal, and "a contingent residuary devise of "freehold land, and a specific or resi-"duary devise of freehold land to "trustees upon trust for persons "whose interests are contingent or "executory shall, subject to the statu-"tory provisions relating to accumu-"lations, carry the intermediate in-"come of that property from the "death of the testator, except so far "as such income, or any part thereof, "may be otherwise expressly disposed "of."

"deemed for the purposes of section 31 of the Trustee Act, 1925, "to carry the intermediate income of the baronetcy fund and "accordingly the provisions of that section shall apply as regards "the presumptive interest of the said Francis Patrick Irwin "Crossley in the baronetcy fund and with remainder; (ii) upon "trust for the first and other sons of the said Francis Patrick "Irwin Crossley successively according to seniority in tail male "with remainder; (iii) upon trust for the second third and other "subsequently born younger sons of the said Sir Kenneth Irwin "Crossley successively according to seniority in tail male with "remainder; (iv) upon trust for the said Christopher John "Crossley (grandson of the said Eric Crossley) during his life "if and when he shall attain the age of 21 years and so that "this trust shall be deemed for the purposes of section 31 of "the Trustee Act, 1925, to carry the intermediate income of the "baronetcy fund and accordingly the provisions of that section "shall apply as regards the presumptive interest of the said "Christopher John Crossley in the baronetcy fund."

On the death of Francis Crossley without issue in 1953, questions arose as to the application of the income of the fund until it was ascertained whether Sir Kenneth, who was 78 and had remarried, might or might not have a further son or sons entitled to an entailed interest in the fund under sub-clause (iii) in priority to Christopher. A summons was accordingly taken out raising the questions: (1) whether on the death of Francis without issue the trust for the second and younger sons of Sir Kenneth in tail male carried the intermediate income of the fund until the birth of a second son to Sir Kenneth or until his death, whichever event first occurred; (2) if so, whether the income of the one-half of the fund contributed by Sir Kenneth should be accumulated, with a resulting trust for the estate of Eric of the income of the half contributed by him; (3) if not, whether (a) the income was payable to Christopher during his lifetime, and after his death to the persons for the time being entitled to the income of the baronetcy fund in remainder expectant on the failure of the trust for the younger sons of Sir Kenneth, or (b) resulted to the estates of Sir Kenneth and Eric.

E. G. Wright for the trustees.

J. A. Brightman for Sir Kenneth. None of the defendants desires that there should be either an accumulation or a resulting trust for the settlors of the intermediate income. It is contended, therefore, that the gift in clause 4 (iii) in favour of the second and other sons of Sir Kenneth should not carry the intermediate income, and that the interest of Christopher under sub-clause (iv) should be accelerated. This should result both from the application of section 130 (1) of the Law of Property Act, 1925, and from the true construction of the settlement.

The interests given by clause 4 are governed by section 130 (1), which provides that entailed interests in personalty are to be subject to the same rules of law as governed estates tail in realty. One of those rules was that, pending the birth of a tenant in tail who, on being born, would be entitled in possession, the income of the land was not accumulated. The reason for this was the rule that a freehold estate could not be in abeyance: *Bective* v. *Hodgson* [2]; *In re Mowlem.*[3] That rule no longer applies to contingent devises, as section 175 (1) now provides that such devises shall carry the intermediate income; but that section has no application to interests created inter vivos by deed.

The same result follows from a proper construction of the terms of the settlement. The gifts to Francis and Christopher in sub-clauses (i) and (iv) expressly deal with intermediate income; while the gifts in sub-clauses (ii) and (iii) to the unborn sons of Francis and Sir Kenneth do not include it.

As these are equitable interests, the interest of Christopher must be accelerated: *In re Willis.*[4] He is entitled in possession until a further son is born to Sir Kenneth.

G. A. Rink, for the personal representatives of Eric, supported the above argument.

W. J. C. Tonge for Christopher. The decision of Younger J. in *In re Willis* [4] was approved by the Court of Appeal in *In re Conyngham.*[5]

Wright for the unborn sons of Sir Kenneth. The reason for the rule that in the absence of a tenant in tail in possession the income was not to be accumulated was based entirely on a feudal conception relating to land. In the case of contingent gifts of personalty the rule did not apply, and such gifts carried the intermediate income: see *In re Medlock.*[6]

In section 130 (1) the expression " with the like results " must mean " with the like statutory results "; otherwise, there would be a conflict between section 130 (1) and section 175 (1) regarding contingent entailed interests created by will, which, under the latter subsection, are to carry intermediate income. Parliament intended by section 175 (1) that all contingent interests should carry intermediate income.

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[2] (1864) 10 H.L.C. 656.

[3] (1874) L.R. 18 Eq. 9.

[4] [1917] 1 Ch. 365.

[5] [1921] 1 Ch. 491; 37 T.L.R. 420.

[6] (1886) 55 L.J.Ch. 738.

There should be an accumulation of one-half of the intermediate income and a resulting trust of the other half to the estate of Eric.

Brightman replied.

Wynn-Parry J., after stating the facts: It so happens that it is in the interest, for various reasons, of all the defendants to contend that in the events which have happened the intermediate income ought not to be accumulated, and that the interest of Christopher John Crossley in the baronetcy fund should be treated as having been accelerated. In those circumstances, Mr. Wright, for the plaintiffs, argued in favour of the contrary view on behalf of the unborn children of Sir Kenneth Irwin Crossley.

Two points have been argued, one a question of law and the other a question of fact. So far as the question of law is concerned, Mr. Brightman has submitted that section 130 (1) of the Law of Property Act, 1925, applies to and governs this case. That section appears at the beginning of Part IV under the heading "Equitable interests and things in action," and deals with the creation of entailed interests in real and personal property.

[His Lordship read subsection (1) and continued:] It is quite clear that the deed of appointment and settlement creates an entailed interest in personalty, so that it is covered by subsection (1). The effect of that subsection is, that since 1925 the same rules cover an entailed interest of personalty as previously governed an estate tail in realty. One result of creating an estate tail in realty before 1926 was that, pending the birth of a person who, on being born, would be entitled in possession, the intermediate income was not accumulated, and that rule was based on the principle that at common law a freehold estate could never be in abeyance. If authority be wanted for that proposition, it is to be found in *Bective* v. *Hodgson* [1] and *In re Mowlem.* [2]

Against that it was submitted by Mr. Wright that the construction which Mr. Brightman sought to place on section 130 (1) was too wide, and that the words "with the like results," when considered in the context provided by the subsection as a whole, meant no more than "with the like statutory results"; and in support of that submission he contended that to take the

[1] (1864) 10 H.L.C. 656.

[2] (1874) L.R. 18 Eq. 9.

contrary view would involve that there was a conflict between sections 130 (1) and 175 (1) of the Law of Property Act, 1925. Section 175 is the first section of Part X, and appears under the heading "Wills." It deals with contingent and future testamentary gifts which are to carry the intermediate income. For my part, I do not see that there is any conflict between the two sections, even if I give to the words "with the like results" the extended meaning that Mr. Brightman contends for. It appears to me that the contrast to be drawn is between testamentary dispositions on the one hand under section 175, and dispositions inter vivos on the other hand under section 130, and that, as Mr. Brightman submitted, the design of section 130 (1) is to assimilate the rules dealing with both real and personal property. Under section 130 it seems to me that the old common law rule is preserved and is made applicable to personal property, though a different rule applies where the property is the subject of a testamentary disposition, when section 175 will apply.

Turning back to section 130 (1), and construing it, as I feel I am entitled to do, on the basis that there is no conflict between that subsection and section 175 (1), what is the scope of this section? The words "with the like results" prima facie mean "with all the like results." They are followed by the words "including the right to bar the entail," words obviously not designed to cut down the scope of the words "the like results." Then follow the words "and accordingly all statutory provisions "relating to estates tail in real property shall apply to entailed "interests in personal property." I find nothing in those words which can be said to have the effect of cutting down anything. They are merely, to my mind, declaratory, and on one view they are unnecessary. To my mind their usefulness lies in their inclusion ad majorem cautelam and for the purposes of making clear beyond doubt that statutory provisions as well as pre-existing rules of law shall apply to entailed interests. I agree, therefore, with Mr. Brightman's submission on his first point.

The other point that was argued was a point of construction on clause 4. It is to be observed that in sub-clause (i), which deals with the life interest given to Francis Patrick Irwin Crossley, there is an express provision that the trust shall be deemed, for the purposes of section 31 of the Trustee Act, 1925, to carry the intermediate income of the baronetcy fund, and accordingly the provisions of that section should apply as regards his presumptive interest. When, however, the draftsman comes to deal with the case of the first and other sons of Francis, no mention is made of the intermediate income; nor is any mention made of the intermediate income in the creation of interests for the second, third and other subsequently born younger sons of Sir Kenneth Irwin Crossley; but when one comes, in sub-clause (iv), to the interest of Christopher John Crossley, which is again a life interest, if and when he shall attain the age of 21 years, there is again an express reference to section 31 of the Trustee Act, 1925, and a direction that the trust shall, for the purpose of that section, be deemed to carry the intermediate income of the baronetcy fund.

Mr. Wright submitted that the only reason why, in sub-clause (i) and sub-clause (iv) there was any express reference to the intermediate income, was to give Francis in sub-clause (i) and Christopher in sub-clause (iv) that which otherwise they would not have been entitled to, namely, the income during minority; but, to my mind, that does not conclude the matter. On the death of Francis in 1953 it became necessary to find the destination of the intermediate income pending some person being born who would qualify under sub-clause (iii). I say "under sub-clause (iii)," because obviously on the death of Francis sub-clause (ii) could no longer have any possible effect; but it seems to me that, on the true construction of the clause, that very event is adequately provided for by sub-clause (iv), which is apt to refer back to the death of Francis and to carry the immediate intermediate income from that date, unless and until someone comes into existence qualified under sub-clause (iii), when the interest in the intermediate income of Christopher will be liable to be divested.

The last point that was adumbrated was one which was not developed, because it was agreed at all hands that, if I should take the view which I have expressed, the interest of Christopher must be accelerated. Authority for that proposition was cited, but I do not consider it necessary to refer to it, as the principle is so clearly established.

There will be declarations that in the event which has happened of the death of Francis Patrick Irwin Crossley without issue, the trust for the second, third, and other subsequently born younger sons of Sir Kenneth Crossley successively in tail male in the said deed of appointment and settlement contained does not carry the intermediate income of the baronetcy fund, and that during the period aforesaid the said income is and will be payable to the defendant Christopher John Crossley if he so long lives and after his death (if he dies during the said period) to the persons for the time being entitled to the income of the

1955

CROSSLEY'S SETTLEMENT TRUSTS, *In re.* CHIVERS *v.* CROSSLEY.

baronetcy fund in remainder immediately expectant on the failure of the said trust for the subsequently born sons of Sir Kenneth Crossley.

Declarations accordingly.

Solicitors: *Taylor & Humbert; Eland, Hore, Pattisson, Nettleship & Butt; Ridsdale & Son.*

F. R. D.

C. A.

1955
June 15, 16, 20, 21.

Evershed M.R., Jenkins and Parker L.JJ.

In re B. JOHNSON & CO. (BUILDERS) LD.

[Manchester, 1948 B. No. 2. Liverpool, 1948 B. No. 5710.]

Company—Winding up—Misfeasance—Receiver appointed by debenture holder—Whether "manager" or "officer of the company" for purpose of misfeasance proceedings—Ambit of misfeasance proceedings—Companies Act, 1948 (11 & 12 *Geo.* 6, *c.* 38), *ss.* 333 (1), 455.
Company—Debenture—Receiver.

By section 333 (1) of the Companies Act, 1948: "If in the "course of winding up a company it appears that any . . . "director, manager or liquidator, or any officer of the company, "has misapplied" any property of the company, the court may, on the application of a contributory, examine into such conduct.

The applicant had, since its incorporation, been chairman and manager of a company formed in 1940 to carry on the business of builders and contractors, and he held 700 of the 1,000 £1 shares which constituted the capital of the company. The company was financed by advances made by a bank which were secured by a debenture in common form charging all the company's undertaking and property. On August 9, 1947, the bank, in exercise of its powers under the debenture, appointed the first respondent receiver and manager of the company's property and he went into possession and proceeded to realize the company's assets. On January 27, 1948, an order was made for the compulsory winding up of the company and the second respondent was appointed liquidator. The receiver was discharged in May, 1949. The applicant by this summons under section 333 of the Companies Act, 1948, sought an order for the investigation of the conduct of the receiver and of the liquidator. The applicant alleged that the receiver had, immediately on his appointment, not continued the company's business, but had sold certain building estates of the company with partially erected houses thereon, with resultant loss. He also made other allegations of negligence against both the receiver and the liquidator:—

Held, (1) that a receiver and manager of a company's property appointed by a debenture holder was not an "officer" of the company within the definition of "officer" in section 455 of the Companies Act, 1948, since any work of management he might do was not done by virtue of any office which he held of the company; nor was he a "manager" of the company within section 333, because such a receiver and manager was not managing on the company's behalf but was managing on the debenture holders' behalf to facilitate the enforcement of the security; and that, accordingly, the receiver was not within the class of persons whose conduct could be the subject of an examination under section 333.

(2) That section 333 was a procedural section which created no new cause of action and that the acts covered by the section were acts which were wrongful according to the established rules of law and equity, but that it was not every kind of wrongful act which was comprehended by the section and that a case of common law negligence was not within the section; and that, on the facts, the matter should not be allowed to proceed, since the charges did not amount to more than ordinary claims for negligence at law.

In re Kingston Cotton Mill Co. (*No.* 2) [1896] 2 Ch. 279; 12 T.L.R. 430 and *In re Etic Ld.* [1928] Ch. 861 applied.

Appeals from a decision of Sir Leonard Stone V.-C. given in the County Palatine Court of Lancaster.

B. Johnson & Co. (Builders) Ld. was incorporated on April 29, 1940, with a share capital of £100, which was subsequently increased to £1,000, divided into 1,000 shares of one pound each. The applicant, Herbert Francis Granby, was the holder of 700 of the one pound shares and he had been the managing director of the company from 1940. By a debenture dated August 9, 1940, the company created a floating charge upon all its undertaking and property in favour of Barclays Bank Ld. to secure all moneys then or at any time thereafter due from the company to the bank. The debenture, which was in common form, empowered the bank, at any time after it should have demanded payment of the moneys thereby secured, to appoint a receiver of the property thereby charged as if the bank were mortgagees within the meaning of the Law of Property Act, 1925, and had become entitled under that Act to exercise the statutory power of sale, and any receiver so appointed was to be the agent of the company and was to have power, inter alia, to take possession of the company's business and to sell any of the property thereby charged.

The company carried on the business of builders and contractors, and by 1947 approximately £29,000 was owing to the bank. On August 5, 1947, the bank obtained leave under the Courts (Emergency Powers) Act, 1943, to appoint a receiver and manager of the company's property charged by the debenture,

C. A.
1955

B. Johnson & Co. (Builders), *In re.*

and subsequently an order granting leave to sell was obtained by the bank. On August 9, 1947, the first respondent, Thomas Alan Aizlewood, was appointed by the bank to be receiver and manager of the property charged by the debenture upon the terms of the debenture. An order for the winding up of the company was made on January 27, 1948, and on March 3, 1948, the second respondent, Eric Stevenson Browne, was appointed joint liquidator with a Mr. P. E. Booth, who had since died. At the date of the appointment of the receiver the company owned certain building estates which it was in process of developing. In the case of its building estate at Whiston, in Lancashire, 32 houses were in course of erection, and large sums had been spent in connexion with road making and sewers. The receiver immediately stopped the company's business and proceeded to sell the company's properties. The receiver continued in possession until May 19, 1949, when he was discharged from his receivership and managership and the liquidator took over the control of the company's affairs.

On December 14, 1953, the applicant took out this summons under section 333 of the Companies Act, 1948,[1] to which the receiver and liquidator were respondents, asking that the court might examine into the conduct of the receiver while acting as receiver and manager of the company for Barclays Bank Ld., the debenture holder, from August 9, 1947, until the winding up, and for a similar inquiry into the conduct of the liquidator. The summons specified a number of grounds for the application. Three only were specifically dealt with on the appeal. The first, in paragraph 4 of the summons, was an allegation that the receiver had stopped the work of the company and failed to complete certain uncompleted houses; the second and third, contained in paragraphs 10 and 11 of the summons, related to an alleged failure of the receiver and liquidator with regard to claims under the Town and Country Planning Act, 1947. These allegations, together with the points of claim in which they were elaborated, are fully stated in the judgment of Evershed M.R.

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[1] Companies Act, 1948, s. 333 (1): "If in the course of winding up a "company it appears that any person "who has taken part in the formation "or promotion of the company, or "any past or present director, manager or liquidator, or any officer of "the company, has misapplied or retained or become liable or accountable for any money or property of "the company, or been guilty of any "misfeasance or breach of trust in "relation to the company, the court "may, on the application of the "official receiver, or of the liquidator, or of any creditor or contributory, examine into the conduct of "the promoter, director, manager, "liquidator or officer, and compel him "to repay or restore the money or "property or any part thereof respectively with interest at such rate as "the court thinks just, or to contribute such sum to the assets of the "company by way of compensation "in respect of the misapplication, retainer, misfeasance or breach of "trust as the court thinks just."

S. 455 (1): "In this Act, unless "the context otherwise requires, the "following expressions have the "meanings hereby assigned to them "(that is to say):—. . . 'officer', "in relation to a body corporate, "includes a director, manager or "secretary. . . ."

Sir Leonard Stone V.-C. directed the matter to proceed both against the receiver and the liquidator, and ordered the delivery of points of claim by April 20, 1955, and points of defence by May 4, 1955.

The receiver and the liquidator both appealed. Notwithstanding the appeals, elaborate points of claim and of defence were delivered which, so far as they are relevant, are fully stated in the judgment of Evershed M.R.

Sir Lynn Ungoed-Thomas Q.C. and *J. Turner* for the receiver. Three questions arise in considering whether this misfeasance summons should proceed. The first is whether a receiver with powers of management appointed by debenture holders is a person to whom section 333 of the Companies Act, 1948, applies. The Vice-Chancellor was of opinion that the receiver was within the section, holding that, although he was not an "officer" of the company, he was a "manager." A section similar to section 333 is to be found in the Companies Act, 1862, and in every subsequent Companies Act; there is, however, no reported decision in which a receiver has been held to be liable to misfeasance proceedings. A receiver and manager appointed by debenture holders is primarily a person on whom powers of management have been conferred to enable him the better to perform his function of realizing the company's assets for the debenture holders. He is manager of the *property* of the company but not manager of the company. The distinction is apparent from the wording of sections 367, 369, 371 and 374 of the Act of 1948, in which the reference is always to "the manager of the property of a "company." Section 333 deals with a limited number of cases. For a person to be within the section, he must be someone owing duties exclusively to the company. In the case of a receiver, questions of the construction of his powers under the debenture might arise, which would affect the debenture holders. The question of the exercise of a receiver's powers should be decided in proceedings to which the debenture holders could be parties. No question of the rights of third parties can arise where the person concerned owes duties to the company only.

The definition of "officer" in section 455 includes a "director, "manager or secretary." It shows that "manager" in the Act means manager of the company. A receiver is not a "manager" within section 333. A receiver is not an "officer" of a company. An officer in section 333 means a person who holds an office under the company. In *In re Western Counties Steam Bakeries and Milling Co.*[2] it was held that a trustee for debenture holders nominated by a company did not hold an office of profit. A receiver's powers are not vested in him by the company but by the debenture holders. Under section 109 (5) of the Law of Property Act, 1925, a receiver is removable by the debenture holders. He is neither paid nor controlled by the company and his powers are regulated by the debentures. A receiver is outside the scope of section 333.

G. Glynn Blackledge Q.C. and *A. Owen Hughes* for the applicant, on the construction of section 333. The section should be widely construed. It provides a convenient method of deciding certain matters on a liquidation. The meaning of "manager" was considered in *Gibson* v. *Barton*[3] in connexion with the Act of 1862: that decision shows that whether a person is a manager or not is a question of fact. Here the receiver had control of all the business of the company. He was a manager within the section. The decision in *In re Western Counties Steam Bakeries and Milling Co.*[4] turned on the provisions of the Act of 1862. [Reference was made to *In re Mercantile Trading Co., Stringer's* case.[5]]

Sir Lynn Ungoed-Thomas Q.C. continuing for the receiver. The definition of "officer" in section 455 of the Act of 1948, which is not to be found in the earlier Acts, has not altered the meaning of the word in section 333, where it still has the same meaning as in the earlier Acts. A receiver is not an "officer" of the company; his powers are derived from the debenture and the directors of the company have to act as he may direct. A "manager" is a person who manages a company. *Astley* v. *New Tivoli Ld.*[6] does not decide that a trustee for debenture holders is an officer of a company. The decision in *Gibson* v. *Barton*[7] deals with another section of the Act.

The second contention is that, even if a receiver is within section 333, the summons does not disclose a case of misfeasance. For proceedings under the section to lie, it is necessary for the applicant to establish: (1) that there has been misfeasance; (2) that the misfeasance has resulted in loss to the company, and (3) that the applicant himself has suffered loss. Section 333 establishes a summary method of procedure where a remedy by action is also available. But misfeasance proceedings do not apply to every case where the persons within the ambit of the section have been guilty of some actionable wrong affecting the company. The gist of the proceedings is loss. The applicant must show that he has a pecuniary interest in the result. [Reference was made to Buckley on the Companies Acts, 12th ed., pp. 676, 677, *Cavendish Bentinck* v. *Fenn*[8] and *In re Etic Ld.*[9]] The summons in the form in which it was issued does not make any money claim. Various declarations only are sought. The applicant should in this case have proceeded under section 268 of the Act of 1948. Section 333 does not apply.

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[2] [1897] 1 Ch. 617; 13 T.L.R. 276.

[3] (1875) L.R. 10 Q.B. 329.

[4] [1897] 1 Ch. 617.

[5] (1869) L.R. 4 Ch. 475.

[6] [1899] 1 Ch. 151.

[7] L.R. 10 Q.B. 329.

The third contention is that whether section 333 on its true construction applies here or not, the court in its discretion should not allow the summons to proceed. After the debenture holders have been paid, a small surplus will remain which will be insufficient to pay the unsecured creditors. There is no evidence that any balance will remain for the applicant as a contributory.

G. Glynn Blackledge Q.C. for the applicant. It should be assumed that the applicant has sufficient financial locus standi to submit this case to the court. It was the duty of the receiver to preserve the company's goodwill. He stopped the company's business and so destroyed its goodwill. The points of claim show specifically what are the matters in respect of which the applicant claims relief. They allege that the receiver failed to put in proper claims under the Town and Country Planning Act, 1947. The evidence shows that he did not sell the land of the company for its true value. In effect, the receiver sold what he knew was gold as brass. The question arises whether the applicant should not apply for leave to amend the summons by incorporating therein the points of claim. The applicant has shown that there is here a case for inquiry and the court should not reverse the decision of the Vice-Chancellor.

Sir Lynn Ungoed-Thomas Q.C. in reply. The applicant's summons is misconceived. He should not be allowed to amend his summons by alleging a new cause of action and so defeat the receiver's defence based on the statute. The Statute of

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[8] (1887) 12 App.Cas. 652.

[9] [1928] Ch. 861.

Limitations would afford to the receiver a defence to any new proceedings which the applicant might bring.

E. W. Griffith for the liquidator. Admittedly the liquidator is within the category of persons mentioned in section 333 of the Act of 1948, but none of the matters referred to in the charges brought against him could, even if proved, amount to misfeasance on his part within section 333.

[EVERSHED M.R. May it not be said that the applicant has not sufficient interest in the subject-matter to bring these charges against the liquidator?]

Even if the claims are successful there will not be sufficient to pay all the creditors of the company. Therefore the applicant has no interest in pursuing the matter. It could only be pursued by the creditors of the company.

To come within section 333 it is not sufficient to show that the liquidator was negligent (and it is, of course, denied that he was negligent). It would have to be shown that he had been guilty of misapplication of the company's assets amounting to misfeasance within section 333: see Buckley on the Companies Acts, 12th ed., p. 677. But none of the acts alleged amount to that.

For example, it is alleged that the claim against the Central Land Board was not prosecuted with sufficient skill. As to that, the liquidator will say that he relied on the skill of his professional agents, and, in any case, failure to frame a claim with all due skill does not partake of misfeasance in the nature of breach of trust. There is here no element of misapplication of the property of the company or of dishonesty. [Reference was made to *In re Etic Ld.*[10] and to *In re Kingston Cotton Mill Co. (No. 2)*,[11] citing passages from the judgment of Lindley L.J.[12] and Lopes L.J.[13]] The liquidator is not a trustee of the company's assets except in a limited sense. He is concerned with getting in the assets, not for his own benefit or that of the company but for the creditors and contributories.

If the applicant was dissatisfied with the conduct of the liquidation, he had a remedy available under section 246: he could have applied to the court for directions to be given to the liquidator. Having failed to use the proper remedy, the court should not at this late stage exercise its discretion in his favour, especially when it is borne in mind that there is no third party procedure available in misfeasance proceedings. It would be most unfair if the liquidator could not bring in the professional agents on whose skill he relied in making the claim to the Central Land Board, a matter which was not within the scope of his own professional knowledge.

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[10] [1928] Ch. 861.

[11] [1896] 2 Ch. 279; 12 T.L.R. 430.

[12] [1896] 2 Ch. 279, 283.

[13] Ibid. 288.

A. Owen Hughes in reply. In the cases cited, such as *In re Kingston Cotton Mill Co.* (*No.* 2),[14] the proceedings were concerned with complaints made after the events complained of had taken place. But here the applicant complained several times to the liquidator before the alleged acts of misfeasance were done, and at a time when matters could have been put right. The liquidator's failure was more, therefore, than mere negligence. He was appointed to protect the interests of the creditors and contributories and in his capacity as liquidator he was accountable for all the assets coming into his hands. The duty which he owed was increased by the knowledge of the prior complaints made by the applicant which ought to have aroused his suspicions. But, notwithstanding those complaints, he allowed the receiver to make some sort of application to the Central Land Board which he adopted although he had been informed that it was erroneous. This was not merely negligence, it was recklessness. Further, he ought to have taken steps to stop the sale of the Whiston property, for he must have known that the price was inadequate.

The plaintiff has sufficient interest in the subject-matter, for there are, it is submitted, sufficient assets outstanding, together with the money which it is sought to recover from the liquidator, to enable the company to pay all its creditors in full and leave something over.

Sir Leonard Stone V.-C. exercised his discretion in favour of the applicant after considering the matter carefully on facts which were, for the most part, agreed. His decision ought not to be disturbed, unless it is clear that he exercised his discretion on a wrong ground or principle.

Evershed M.R. These two appeals arise out of an order made by Sir Leonard Stone V.-C. in the Palatine Court of Lancaster, on March 30 last, in the winding up of a company known as B. Johnson & Co. (Builders) Ld. Putting the matter very briefly, the order was made upon an application on the part of a Mr. Granby (whom I will call for convenience hereafter "the plain-"tiff") under section 333 of the Companies Act, 1948. The nature of his claim was that two persons, namely, a Mr. Aizlewood (who had been appointed receiver and manager out of court by Barclays Bank Ld. as debenture holders) and a Mr. Browne (who was the survivor of two joint liquidators) should be rendered accountable under that section on the ground of misfeasance. The order of the Vice-Chancellor, after a considerable hearing, was to the effect that the proceedings should go on against both these gentlemen, subject to certain limitations, which I need not consider; and he gave directions accordingly for points of claim, points of defence, and so forth.

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[14] [1896] 2 Ch. 279.

Each of them, the receiver, Mr. Aizlewood, and the liquidator, Mr. Browne, has appealed to this court; but the cases which they have presented are not entirely the same, and for this reason. The receiver has put in the forefront of his appeal that, in any event, he (having been, as I say, receiver and manager appointed by the bank) is not within the category of persons to whom section 333 (and, indeed, its predecessors) is applicable. He further says that, even if he is within the compass of the section, the conditions of the section are not satisfied, in that the summons which the plaintiff took out does not, upon the face of it, allege against the receiver such matters of fact as would bring the charges (if true) within the purview of the section—in other words, that they are not " misfeasances " as contemplated by the section. The receiver, thirdly, was prepared to argue (though in the event we have not thought it necessary to hear him upon it) that, in the exercise of the court's discretion in this case, the proceedings under section 333 ought not to be or to have been permitted to continue.

The liquidator was unable to raise a point corresponding to the first point put by the receiver, since there is no doubt that a liquidator is, nominatim, amongst the class of persons to whom section 333 relates. He, however, followed the receiver in alleging that the matters of which he is accused were not misfeasances within the section; and he finally contended that, in any case, the plaintiff ought not to be allowed to proceed by this section, having (inter alia) failed to avail himself (as he might have done) of the procedure open to him under section 246 of the Act, for getting the court's directions by way of controlling the liquidation. All these matters that I have related were decided by the Vice-Chancellor adversely to the appellants. I have come to a different conclusion from that of the Vice-Chancellor.

The company was incorporated in 1940. The plaintiff later in that year became one of its directors, and he was at all material times, and is, the holder of 700 out of the total issued share capital of 1,000 shares of £1 each. In the same year, 1940, the company issued to Barclays Bank Ld. a debenture, in ordinary banker's form, containing (among other things) a floating charge upon all the assets of the company, to secure the overdraft by means of which the company proposed to carry on its operations. At the middle of 1947 the company had incurred losses of a somewhat substantial character, and there was owing to the bank a sum of approximately £29,000—a sum, I would observe, about 29 times the issued share capital. The bank were no longer willing to allow their money to be used by the directors as the means (they hoped) ultimately of gaining great profits for the company; and the bank applied in August (as they had to do), under the Courts (Emergency Powers) Act then in force, for leave to appoint a receiver and manager under the terms of their debenture. They obtained the leave of the court, and the receiver, Mr. Aizlewood, was appointed as receiver and manager on August 9, 1947.

It is one of the points made on the plaintiff's part that the receiver forthwith did a very wrong thing: he "deliberately and "wrongfully" (and I am quoting from the plaintiff's pleading) made up his mind to put an end to the active operations of this somewhat speculative company; and in fact he did so. The natural—perhaps inevitable—result was that in January, 1948, the unsecured creditors thought that they should look after themselves, and they presented a petition for the compulsory winding up of the company. A winding-up order was made on January 27, 1948; and later, following the usual meeting of creditors, Mr. Browne and a Mr. Booth, who died in 1952, were appointed joint liquidators. The receiver was, however, still in possession and was not discharged of his receivership and managership until May 19, 1949.

It is a feature of the case (and this is one reason why I have mentioned the dates) that, when I come to look at the application made against the receiver, the charges are limited to the period of time from the receiver's appointment in August, 1947, until January 26, 1948; and, on the face of the summons, no complaint is made of him, or of his performances, after that latter date—a date which, it will now be appreciated, is some seven and a half years ago. I have no doubt that the plaintiff busied himself with making representations to the receiver during his period of office, and to the liquidator; and Mr. Hughes has told us that considerable correspondence exists which we have not seen; but the fact is that no active step was taken by the plaintiff to assert any right which he alleges that he has until December, 1953, when the present summons was taken out, in the first place in the Liverpool District Registry. It is unnecessary to mention in detail what happened to that summons, first in causing it to be transferred to the Palatine Court, and then when it came before the registrar. It is enough to say that it was heard and determined on March 30, 1955.

That is the bare outline; and I will now read section 333, so far as relevant. [His Lordship read section 333 (1), and continued:] The first point which I propose to consider is the first point taken by Sir Lynn Ungoed-Thomas, namely, that a receiver and manager, such as Mr. Aizlewood, appointed under the terms of a debenture, is not within that category of persons specified in the section. It is unnecessary to read all the terms of the debenture, because, having said that it was in a form usual for debentures of this character, I have said enough to make its nature recognized. Paragraph 8 of the debenture provided: " At " any time after the bank shall have demanded payment of any " moneys hereby secured the bank may appoint by writing any " person . . . to be a receiver of all or any part of the property " hereby charged in like manner in every respect as if the bank " were mortgagees within the meaning of the Law of Property " Act, 1925; . . . every receiver so appointed shall have power " to do the following things, namely: to take possession of . . . " the property hereby charged . . . to carry on or concur in " carrying on the business . . . to sell or concur in selling . . . " the property hereby charged "; and other ancillary matters, including that of appointing " managers officers and agents for " the aforesaid purposes."

The situation of someone appointed by a mortgagee or a debenture holder to be a receiver and manager—as it is said, " out " of court "—is familiar. It has long been recognized and established that receivers and managers so appointed are, by the effect of the statute law, or of the terms of the debenture, or both, treated, while in possession of the company's assets and exercising the various powers conferred upon them, as agents of the company, in order that they may be able to deal effectively with third parties. But, in such a case as the present at any rate, it is quite plain that a person appointed as receiver and manager is concerned, not for the benefit of the company but for the benefit of the mortgagee bank, to realize the security; that is the whole purpose of his appointment; and the powers which are conferred upon him, and which I have to some extent recited, are (as Sir Lynn observed, and I think fairly observed) really ancillary to the main purpose of the appointment, which is the realization by the mortgagee of the security (in this case, as commonly) by the sale of the assets.

All that is perhaps elementary; but it bears upon what I shall have to say as regards the charges made against the receiver; for it appears to me inevitably to negative the proposition that a person appointed, as Mr. Aizlewood was appointed, owes some duty to the company to carry on the business of the company and to preserve its goodwill. For the moment, however, I have mentioned these matters in order that I may consider what is the effect of the use of the word "manager" in section 333 (1); and it is to be noted that, by the definition section, section 455, the word "officer" in this Act, unless the context otherwise requires, "includes a director, manager or secretary." It was, therefore, a point of some force put forward by Mr. Blackledge, for the plaintiff, that, since the word "officer," which is used in the relevant places in this section, includes a manager, the express use also of the word "manager" must cover someone who was a manager but was not an officer.

If this Act had been the first enactment designed to regulate the affairs of joint stock companies, I can see that there might have been much force in that argument. But this, after all, was a consolidating Act; and it is of interest, and I think relevant, to observe that the so-called "misfeasance" section, which is now section 333, has had a long history, having first formed part of the Companies Act of 1862, when its counterpart was section 165. We have been referred by Sir Lynn to that section, and to the sections of the later enactments of 1890, 1908 and 1929; and, though there are some variations in terminology and some change in the dispersal of the commas in the section, there is no doubt that the general formula, the list or category of "promoter, "director, manager, liquidator or officer," has consistently appeared in this section and its predecessors for close upon one hundred years; and it is the fact that the definition of "officer" in section 455 is the first statutory definition that has appeared in those enactments.

To my mind it is reasonably clear that in this Act (as in its predecessors) Parliament has taken up and followed a particular collocation of words which has acquired now a considerable sanctity by age. I cannot think, and am not prepared to hold, that, by giving to the word "officer" a precise definition which covers "manager," Parliament intended to give to the word "manager" in the section a wider signification than it had previously possessed. I am the more encouraged to that view by the fact that the word "officer" in the definition, it will be remembered, also includes the word "director," a word itself also included in the section and, on any view of it, capable of a very precise and well-understood meaning.

I am, therefore, able to reject, and do reject, the view that any help can be had from the definition of the word "officer." The question remains, however, whether any person of Mr. Aizlewood's position is a "manager," as that word is itself used in the subsection. Contrary to the view of the Vice-Chancellor, I have come to the conclusion that he is not. I have already indicated (as is well known) that a person in Mr. Aizlewood's position, though called a "receiver and manager," is, in fact, one who is appointed a receiver, not with any duties to carry on the business of the company, in the best interests of the company, but in order to realize, for the debenture holders or mortgagees, the security which they have got; and only for that limited purpose is he given powers of management. The limit or special nature of his functions as manager is, I think, well illustrated in the Act itself. Sir Lynn directed our attention to the other sections of the Act (beginning at section 367) which concern receivers and managers. Those sections seem to me to state, plainly and deliberately, that a person appointed as receiver and manager is not, on any view, a manager of the company; he is (as these sections state over and over again) receiver and manager "of the property of a company."

The distinction may at first sight seem fine between a receiver and manager of the property of a company, on the one hand, and a manager of the company, on the other, being the formula found in section 333; but the logic of it and the substance of it is that which is to be found in what I have already said—that a person appointed receiver and manager, so-called, is not managing on the company's behalf but is managing in order to facilitate the exercise by him, for the mortgagees, of the mortgagees' power to enforce the security. I think myself, also, that the point is further emphasized by the consideration that, so far as I can see, if Mr. Blackledge were right, a receiver and manager appointed by the court would equally have to be held to be a "manager" within section 333, although in that case the receiver would not for any purpose be the agent of the company at all: he would be an officer of the court. In short, the word "manager" in this section, to my mind, excludes one who is only a manager because he is, as receiver (which is his real capacity), endowed for the purposes of his receivership with certain powers of management.

Two further points seem to me to emphasize the sense that I seek to give to this word. They really are two riders or corollaries of the general principle that I have stated. The first is this: It may well be that a mortgagee, a debenture holder, who has, say, a fixed charge on the real property of the company and a floating charge on everything else, is not going to realize an amount by sales sufficient to discharge the indebtedness to him. I understand that in this case, by a small margin, that has been achieved. But it is elementary that a mortgagee seeking to realize his security has no duty of care to see that there is as much as possible left over for those who are interested in what is called the "equity." In other words, it may well be (as Jenkins L.J. pointed out in the course of the argument) that the company may have, in such a case as this, no equity whatever, in any real sense; and, if that is so, it would be indeed a strange use of language to describe one appointed as receiver and manager under the debenture as a manager of the company.

My second point is, in a sense, but a development of the first, but I mention it because it is of significance also to the liquidator's argument. Section 333, it has been many times said, is a purely procedural section. I do not in the least seek, by so stating, to lessen its significance: I mean (to restate it) that it does not create any new cause of action; it only provides a method of litigating particular claims; and, in providing a method, it is not exclusive. Prima facie (though, as will be later seen, there are difficulties in the plaintiff's way in this case), if the procedure of section 333 is not open against any person who is within the section, the claimant may proceed by ordinary action. But there is this procedural difference, which may, I think, indicate the kind of case to which it is intended to refer: whereas, in an ordinary action, it would be open to the person charged to bring in (if it were proper procedurally to do so) some third party whom that person might seek to make responsible; in a case under section 333, no such third-party procedure appears to be available.

I have already said that the receiver indicated, when he took possession, that he proposed to sell, and, in so doing, there can be no doubt that he was acting in accordance with the directions of the bank; and, in an action which alleged that it was a wrongful act to refuse to carry on the business of the company, the receiver might well seek to bring in the bank to indemnify him, if such an allegation were shown to be well founded. But no such possibility exists here; and having regard, therefore, to the position of the receiver vis-à-vis the mortgagee, I am encouraged, by that and other considerations of the kind, to the view that, by "manager," Parliament in this section did not intend to refer to a receiver and manager appointed either out of court or by the court. I come to the conclusion that Mr. Aizlewood was not a "manager" within the contemplation of section 333, and, therefore, that the Vice-Chancellor should not have allowed the matter to proceed under that section against him.

That view of the case is sufficient to dispose of this appeal in Mr. Aizlewood's favour; but, since other matters have been raised and considered by the judge, and since this case has unfortunately acquired mass by its momentum, it will be perhaps desirable that I should say something also on the second point, namely, whether the allegations made against the receiver were allegations of "misfeasance," as that word is understood in the section. That point raises the problem of the scope of section 333, not as regards the persons who are subject to the procedure ordained by that section, but as regards the nature of the claims which may be made under it. I repeat, that the section is a procedural section. There is no such distinct wrongful act known to the law as "misfeasance." The acts which are covered by the section are acts which are wrongful, according to the established rules of law or equity, done by the person charged in his capacity as "promoter, director," etc. But it is clearly established that it is not every kind of wrongful act so done that is comprehended by the section. At one end of the scale it may, I think, be taken as prima facie clear that a wrongful act involving misapplication of property in the hands of the person charged would be covered by its terms. At the other end of the scale, a claim based exclusively on common law negligence, an ordinary claim for damages for negligence simply, would not be covered by the section. Nor is such a claim brought within the section by the mere expedient of adding epithets to the negligence charged, calling it "gross" or "deliberate." Nor, by that expedient, without more, can what in truth is mere negligence be converted into something else, namely, breach of trust. But in between the two extremes that I have mentioned there is obviously a large range of conduct which may (or may not) be within the section. I shall follow others in not attempting any precise definition of what does or does not fall within it. I would like, however, to cite a passage from the judgment of Maugham J. in *In re Etic Ld.*[1] In that case the judge made reference to *Coventry and Dixon's* case[2] and certain other cases, and then he said[3] this, of the language of Sir George Jessel M.R. in *In re Anglo-French Co-operative Society; Ex parte Pelly*[4]: "The language of Sir George Jessel in dealing with the matter "in his decision in *Ex parte Pelly*[4] strongly tends to show "that in his view section 215" (now section 333 of the Act of 1948) "really only applies where there has been some "wrongful act by the director, manager, liquidator, or other "officer of the company, either of the nature of misfeasance, or "of the nature of breach of trust in a wide sense, including no "doubt a breach of trust by negligence, or something of that "kind." Later the judge, after further references to cases, including that of *Cavendish Bentinck* v. *Fenn*,[5] said[6]: "The "conclusion at which I have arrived is that section 215 is not "applicable to all cases in which the company has a right of "action against an officer of the company. It is limited to cases "where there has been something in the nature of a breach of "duty by an officer of the company as such which has caused "pecuniary loss to the company. Breach of duty of course would "include a misfeasance or a breach of trust in the stricter sense, "and the section will apply to a true case of misapplication of "money or property of the company, or a case where there has "been retention of money or property which the officer was bound "to have paid or returned to the company."

Mr. Griffith, on behalf of the liquidator, also referred to *In re Kingston Cotton Mill Company (No. 2)*[7] in support of the proposition that even a breach of trust, to be brought within the section, must involve a misapplication of the assets, in some form, by the officer charged. He cited this passage from Lindley L.J.[8]: "I "agree that the section does not apply to all cases in which "actions will lie by the company for the recovery of damages "against the persons named; it is easy to imagine cases of "breach of contract, trespasses, negligences, or other wrongs to "which the section is inapplicable, and some such have been "the subject of judicial decision; but I am not aware of any "authority to the effect that the section does not apply to the "case of an officer who has committed a breach of his duty to

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[1] [1928] Ch. 861, 873.
[2] (1880) 14 Ch.D. 660.
[3] [1928] Ch. 861, 873.
[4] (1882) 21 Ch.D. 492.
[5] (1887) 12 App.Cas. 652.
[6] [1928] Ch. 861, 875.
[7] [1896] 2 Ch. 279; 12 T.L.R. 430.
[8] [1896] 2 Ch. 279, 283.

"the company, the direct consequence of which has been a "misapplication of its assets, for which he could be made "responsible by an action at law or in equity."

Lopes L.J. said something to the same effect[9]: "The learned "judge in the court below held that misfeasance covered any "misconduct by an officer of the company as such for which "such officer might have been sued apart from the section. In "my judgment this is too wide. It would cover any act of "negligence—any actionable wrong by an officer of a company "which did not involve any misapplication of the assets of the "company. The object of this section of the Act is to enable "the liquidator to recover any assets of the company improperly "dealt with by any officer of the company, and must be interpreted bearing that object in view. It doubtless covers any "breach of duty by an officer of the company in his capacity of "officer resulting in any improper misapplication of the assets "or property of the company."

Those passages may, I think, be taken as authority, or as included among the authorities, establishing that a simple case of negligence at common law would not be within the section. But in my judgment Lindley and Lopes L.JJ. did not intend to lay it down by inference that any breach of duty, including a breach of trust, which did not involve a misapplication of assets, was outside the section. What they were saying was the converse: that, where a breach of duty had been committed, which did in fact result in a misapplication of the company's property, then such a transaction would be within the ambit of the section.

With this introduction, I will turn to the summons in the present case, which is an exceedingly elaborate document. I will, however, follow Mr. Blackledge in taking three of the matters alleged in the summons and adopt his suggestion that, if none of these three is shown to be within the scope of the section, then none of the charges against the receiver will be so comprehended. The first instance he took was that indicated in paragraph 4 of the summons: "On August 12, 1947, the said Thomas Alan Aizlewood took over his duties as such receiver and manager as "aforesaid and informed the plaintiff that it was his intention to "stop immediately all building work. It was pointed out to him "that this would entail great loss for the company having regard "to money spent on road and sewerage work and building of "then uncompleted houses, but in spite of this all building work "was stopped on October 2, 1947."

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[9] [1896] 2 Ch. 279, 288.

In other words, the gist of the charge (expanded in the points of claim, which I will mention in a moment) is that the receiver had a duty to the company and its contributors to preserve the goodwill and business of the company. In my judgment, that allegation rests upon a fundamental misapprehension. There was not, in this case, and there is not in similar cases, any such duty on a mortgagee or a receiver appointed by a mortgagee for the purpose of realizing the mortgagee's security. I have no doubt that the plaintiff in this case is greatly disappointed. He has said that the transactions which the company entered into were of the happy sort that you cannot lose upon them; but, unfortunately, the plaintiff and his company depended upon the goodwill of Barclays Bank, which provided the whole of the money for the company's speculations. The bank, the plaintiff says, became altogether unduly alarmed at the effect of the Town and Country Planning Act, 1947. Whether they did or whether they did not, it is not necessary for me to determine; but the moral (as it seems to me) of the matter is this, that, if you depend exclusively on borrowed money for the business you propose to carry on, you must at all costs retain the confidence of your lender. In this case, further, in so far as the charges against the receiver involve the proposition that the receiver did not get the best price he could have got and should have got, equally those charges, in my judgment, rest upon a misapprehension of the elementary principle that a mortgagee, or a receiver exercising the mortgagee's powers of sale, is under no such duty to the mortgagor to obtain the best possible price for the property charged.

I return, however, to paragraph 4, and, as I have earlier indicated, some expansion of the rather general allegations in the paragraph is to be found in the document called the points of claim, which was in fact delivered on or about April 20 last. The points of claim much expand and elaborate the subject-matter which I have already mentioned. They use the epithets I have quoted—that the action of the receiver in failing to continue to carry on the business was " deliberate and wrongful "; and, as an illustration of those allegedly deliberate and wrongful acts, it is said that he abandoned a contract with the Liverpool Warehousing Co. Ld. the value of which was no less than £28,000. The answer, however, to my mind, is quite simple: in order to complete the contract with the Liverpool Warehousing Co. Ld. it would have been necessary to continue the business of the company, B. Johnson & Co. (Builders) Ld.; and, as I have already indicated, the receiver appointed for the purpose of realizing the debenture holders' security was under no obligation to the company or its contributories to continue its business; nor could he continue it without getting further finance from some source or another. The result was (so far as I can see, inevitably) that he had to discontinue it, and discontinue the building work for the Liverpool Warehousing Co. Ld.

The other two cases taken by Mr. Blackledge are intimated (for they cannot be said to be more precisely stated) in paragraphs 10 and 11 of the summons. Paragraph 10 (so far as relevant) is: "There is outstanding a claim against Central Land "Board in respect of loss of development under the Town and "Country Planning Act, 1947, in respect of the St. John's "Road Huyton land before mentioned. An incorrect application "was put in to Central Land Board in respect of this by the "said Thomas Alan Aizlewood." By paragraph 11, "The said "Thomas Alan Aizlewood failed to make application under "section 80 of the Town and Country Planning Act, 1947, for a "certificate of exemption in respect of 47 acres of land on the "Royal Oak Farm at Whiston, and to put in a claim for loss of "development value in respect thereof."

On the face of those general allegations, it would appear to me that the claim amounts to no more than this, that the receiver incorrectly or unskilfully, or otherwise inaccurately, formulated the claims that he had against the Central Land Board. The charges therefore look to me, I must confess, like charges of mere negligence; neither more nor less. In any case, however, it now appears quite clearly that the time at which the claims should have been put in (and they could not have been earlier put in) was a time outside the period for which the plaintiff is charging the receiver. It is made quite plain in the summons (and I shall have something more to say about this when I consider the application to amend) that the alleged wrongful acts of the receiver are confined to the period from his appointment in August, 1947, till the winding-up order in January, 1948; and, when that latter event occurred, the time for putting in the claims to the Central Land Board had not in fact arrived.

Mr. Blackledge again referred us to the points of claim, and he asked specifically for leave to amend his summons by incorporating the substance of what is found on these matters in the points of claim. I will take them in their reverse order. As regards the Royal Oak, or Whiston land, mentioned in paragraph 11 of the summons, that matter is expanded in paragraphs 15 and following in the points of claim. It is said, for example, in paragraph 15, that the land was put up for sale on December 18, 1947, that it contained 45 acres, and that in the auctioneers' catalogue it was described as subject to a particular planning layout approved in 1931. "Before the auction the applicant orally "informed the receiver . . . that this description was inaccurate. "The applicant further informed the receiver that it ought to "have been described as having been the subject of planning "approval . . . in 1946 . . . The said land was therefore within" (certain sections of the Town and Country Planning Act, 1947) "and if sold with the correct description would have then fetched "a figure of approximately £23,000." The pleader says that the error in description was not corrected and, therefore, that in December, the only bid being for £5,000, the property was withdrawn. The paragraphs go on further to say that the property was sold in February, 1948—as I have pointed out, outside the period for which the receiver is now charged—at a price of £6,250, as compared with the figure of £23,000 that I have already mentioned.

Then, as regards paragraph 10 of the summons, the Huyton land, the paragraphs expanding that are paragraphs 18 and following of the points of claim, where they allege that the land was conveyed to the urban district council in October, 1948 (far outside the period charged) at the price named, being the price fixed by the district valuer as the existing use value. Paragraph 20 states that the application to the Central Land Board was submitted by a firm of surveyors acting on behalf of the liquidator; that the original instructions to the surveyors were given by the receiver; that they were adopted and confirmed by the liquidator; that the instructions were inaccurate, and the result was that the application did not contain the correct facts; that the inaccuracy consisted (inter alia) of wrong information being given with regard to the improvements carried out, and also did not show that the land had been acquired before July, 1948, in pursuance of a certain notice to treat. It is said that, in consequence, (putting it quite briefly), the figure for compensation, instead of being £8,600, plus some further figure for loss of development profit, was only £4,500. What Mr. Blackledge said (putting it picturesquely) was that this receiver had sold or offered for sale as brass that which he knew was gold, and that that was something more than mere negligence. I am far from satisfied, even with the elaboration I have made, that there is, in any case, any more in these charges than ordinary claims for negligence at law.

I have already said that the dates when the sales took place were outside the period for which the receiver was charged; but, even if I am wrong in thinking that the claims are of the nature I have mentioned, I am satisfied that it would be wrong now to allow a substantial amendment of the summons which would (in effect) raise quite new cases against the receiver. In particular, it would be of the essence of both cases that the wrongful acts alleged were done at a period after the winding-up order. As Sir Lynn Ungoed-Thomas has pointed out, it is now the month of June, 1955, and, therefore, there would be apparently available, or might be available, to a charge based on negligence in or before May, 1948, a defence arising out of the Statute of Limitations; and I do not think that it would be right, in the circumstances, to allow an amendment which would deprive the receiver of a defence which would or might otherwise be available to him. I therefore do not think it would be right to allow the amendments. For reasons that I have already given, I do not think that, on the face of the summons, the charges made in paragraphs 10 and 11 are charges which could be sustained or prosecuted under the section.

I add only, that in paragraph 9 of the summons there is also an allegation that the receiver, having received certain sums of money on sales, failed to account to the plaintiff for £482. The answer to that, again, is short and simple: The receiver is not, and never was, an accounting party to the plaintiff. I am therefore disposed to think (if it were necessary) that Sir Lynn Ungoed-Thomas is right also on this, his second point. He had a third point, namely, that it was discretionary in the court to allow or not to allow the matter to proceed under section 333, and that, in any event, it would not be right to allow the proceedings to continue against the receiver under this section. But I do not find it necessary to go into that matter. For the reasons I have given, particularly my view that Mr. Aizlewood is not a " manager " within section 333 at all, I think that the receiver's appeal must be allowed.

I turn now to the case of the liquidator. The first point on which Sir Lynn succeeds for the receiver is not, of course, available to Mr. Griffith; for a liquidator is eo nomine within the class of persons who may be charged under that section. Mr. Griffith has therefore relied principally upon what I have called Sir Lynn's second point, that the charges made against the liquidator are not charges of so-called " misfeasance " within the ambit of the section. Upon the face of the summons, the only charge made against the liquidator is the continuation of what I have already read in paragraph 10 about the Huyton land. It will be recalled that against the receiver it was alleged that he had made an incorrect application to the Central Land Board. The summons continues: "On the liquidation of the said "company on January 26, 1948, the said claim was taken over "by the said joint liquidators. The incorrectness was pointed "out by the plaintiff and the said Eric Stevenson Browne has "been requested by the committee of inspection appointed in the "said liquidation to combine with the plaintiff in putting in a "proper application of his but he has failed to do so."

As it stands, it seems to me quite plainly that that allegation cannot be sustained under the section, and we must therefore look once more at paragraphs 18 and following in the points of claim. It will be noticed again that the nature of the charge, so elaborated, has undergone considerable change. There is no mention at all in the points of claim of the alleged request by the committee of inspection to combine with the plaintiff in doing anything. But in this case, as Mr. Griffith conceded for the purposes of the argument, it is not possible for the liquidator to say that an amendment would deprive him of a defence (videlicet, a defence under the Statute of Limitations) which would be otherwise available to him.

But there is, on the other hand, in my judgment, another answer which is fatal to the plaintiff as against the liquidator.

It will be recalled that the alleged consequences of the various wrongful acts, so called, done by the receiver and the liquidator was that the Huyton land claim produced £4,500, when it should have produced £8,600, plus some further sum for loss of development profit. As the summons stands, that is the only claim made against the liquidator. It is, I think, tolerably clear that an applicant under section 333 must establish that he has a real interest in the subject-matter as to which he proposes to claim. (See, for example, the judgment of Maugham J. in the *Etic* case.[10]) The facts in this case show that, by an extremely narrow margin, namely, £83 or so, there was just sufficient to pay the secured creditors; but that, on the facts before us, there are claims of unsecured creditors in addition (for whom only the £83 is available) amounting to over £10,000. It is obvious, therefore, that the difference between £8,600 and £4,500, even with some further sum for loss of development profit added, would be quite insufficient to provide in full for the creditors and leave anything at all for the contributories.

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[10] [1928] Ch. 861, 869.

On that ground, therefore, I think it quite clear that the plaintiff has failed to show a sufficient interest in the subject-matter of his claim, and that it would not, therefore, be right to permit any amendment which might reconstitute or make somewhat more convincing (if I may say so) the charges made against the liquidator in paragraph 10 of the summons. I should, however, say, having referred to the points of claim, that at their end, in paragraph 27, there appear to be added some further general and rather sweeping allegations. It is said that "the liquidator has been guilty of misfeasance or non-feasance " . . . in that he (a) failed to take over the affairs of the company " (in conjunction with his colleague Parkin Stanley Booth) from " the receiver within a reasonable time of being appointed " liquidator and when the said affairs were so taken over not " checking all the accounts and transactions of the receiver " before he was finally discharged." As regards the main part of that charge, it is quite clear that the liquidator could not take over the property and assets of the company until the receiver had been discharged, for the receiver was in possession and exercising his powers of sale. As regards the alleged failure to check, I think I need say no more than that I do not entirely follow what is thereby contended.

" (b) failed in his duty to preserve the assets and goodwill " of the company for the benefit of the creditors and members " thereof ": and then he refers to certain paragraphs. I think, again, that the answer is simple: the receiver was in possession; the receiver was in process of exercising the mortgagee's power of sale; and it would have been quite impossible for the liquidator to do other than he did.

" (c) failed to investigate the complaints repeatedly made to " him concerning the acts and omissions of the receiver." Upon that, the answer appears to me to be (if anything; and I do not quite follow what really is intended) that the charge made would appear to be at best a charge of negligence simpliciter.

Finally, " (d) failed to produce for the benefit of the appli- " cant " certain accounts and information. In my judgment, the liquidator was not, in the circumstances, accountable to the plaintiff in the way alleged. I think, therefore, in the result, that this is not a case which is proper to be brought under the section against the liquidator any more than against the receiver.

I only add two points. In considering the propriety of amendment or the possibility of pursuing the claim about the Huyton land against the liquidator, it will be recalled that (as the plaintiff alleges) the liquidator was acting on the advice and directions of expert surveyors. In so far, therefore, as it might be said or alleged that he should not have accepted the surveyors' advice, it is obvious that a person so charged might desire to bring in as third parties the professional advisers. As I have earlier pointed out, it is not possible in proceedings under this section to bring in third parties; and that is, perhaps, another ground for not permitting this matter to go on by amendment.

Finally (and this, perhaps, is the real answer to much of the plaintiff's complaints), he has, in my judgment, throughout misapprehended his proper remedy. If he was dissatisfied with the way in which the liquidator was carrying on his duties as liquidator, he was entitled under section 246 to make an appropriate application to the court, and the court would then have looked into the matter and, where necessary, have controlled and regulated the activities of the liquidator. I add also in that connexion: it may well be that, as against the receiver, the plaintiff could have more profitably turned to section 268. That, however, is another matter.

For the reasons I have given, I think that both appeals must be allowed; and that the proceedings ought now to be stayed against both the receiver and the liquidator.

JENKINS L.J. I agree. As to Sir Lynn Ungoed-Thomas's preliminary objection, to the effect that a receiver and manager for debenture holders (such as the defendant Aizlewood was in the present case) is not amenable to the summary procedure provided in section 333 of the Companies Act, 1948, the persons to whom that section applies are, "any person who has taken "part in the formation or promotion of the company, or any past "or present director, manager or liquidator, or any officer of "the company." Turning to the definition contained in section 455 (1) of the Act, one finds that "'officer', in relation to a "body corporate, includes a director, manager or secretary." The incorporation of that definition in section 333 (1) produces a strangely tautologous result, for one has an express reference to a "director" and an express reference to a "manager," and the list of persons specified concludes with the words "or any "officer," which, by force of the definition, includes a director or manager.

Reference to earlier enactments on the same subject shows that in section 10 of the Companies (Winding-up) Act, 1890, which deals with the same subject-matter as section 333, the persons made liable, so far as material, were described as "any past or "present director, manager, liquidator, or other officer of the "company"; while, later in the section, the provision for examination of the conduct of the person concerned used the words "director, manager, liquidator, or other officer." Section 165 of the Act of 1862 had, in the earlier part of the section, the formula "director, manager, official, or other liquidator, or any "officer," thus resembling section 333 in that respect; but with regard to the proceedings to be taken against any of the persons enumerated it had the phrase "or other officer."

These statutory materials make possible a number of ingenious arguments. It is arguable that section 333 only applies to a manager of a company if he is an officer of the company, having regard to the definition of "officer" in section 455 and to the use of the words "or other officer" in section 10 of the Act of 1890 and section 165 of the Act of 1862. On the other hand, it may be argued that the section provides that the manager of a company is, for this purpose, to be considered as an officer. Finally, it may be argued that, upon its true construction, the section, referring specifically, as it does, to a manager of the company, includes in its scope any manager of the company, whether he is an officer of the company or not.

I find it unnecessary to assess the relative merits of these arguments. For the purposes of the present case, it is enough to say that proceedings under section 333 cannot lie against Mr. Aizlewood unless it can be held either that his appointment as receiver and manager for the debenture holders in itself made him an officer of the company within the meaning of the section, or, alternatively, that such appointment made him a manager of the company within the meaning of the section. As to the former alternative, I think it reasonably plain that a receiver and manager for debenture holders of a company, appointed by them under powers contained in their debenture (as in the present case), is not an officer of the company within section 333 of the Act of 1948—apart, that is, from the question whether he is a "manager of the company" within the meaning of the section and on that ground to be treated for the present purpose as an officer of the company.

Some support for this view can, I think, be derived from *Astley* v. *New Tivoli Ld.*[11] In that case the articles of association of a company provided that the office of a director should be vacated if (inter alia) he held any other office or place of profit under the company, and the question was whether a director, who had become a trustee of a debenture trust deed, nominated and paid by the company, was disqualified by this provision. He was held to be so disqualified, on the ground that, although a trustee of such a deed might not be an officer of the company, he was the holder of a place of profit under the company and therefore disqualified by the terms of the article.

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[11] [1899] 1 Ch. 151.

Mr. Swinfen Eady said in argument for the excluded director[12]: "A trustee of a covering deed can in no sense be "said to be an officer of the borrowing company. Nor can he "be said to be the holder of a place of profit under the company. "His principal duty is to the debenture holders; to some extent "he is a trustee for both parties; but he is subject to the "directions of no one, and therefore under no one."

North J. said[13]: "In my opinion it is reasonably clear that "the trusteeship is a place of profit under the company. I feel "a little more difficulty in saying that it is an office under the "company for this reason. The covering deed with which we "have to deal is in the ordinary form to secure debentures. "There are two trustees, as is generally the case, and those "persons are trustees for the debenture-holders, though to a "certain extent also, as Mr. Buckley says, they are trustees for "the company, which remains the owner of the equity of "redemption; but those trustees might be nominated, as they "often are, or selected by the persons who are going to lend "their money, and be wholly foreign to the company and its "directors. I do not think that it can be said that the trustees of "a covering deed—a deed primarily for the benefit of creditors— "are necessarily officers of the company. I do not think that "merely as such trustees they are officers of the company, or "could have been held responsible for misfeasance under section "165 of the Companies Act, 1862, or under section 10 of the "Act of 1890. They hold a position in which they are trustees "of the property vested in them first of all for the debenture- "holders, and subject to the claims of the debenture-holders, "they hold it for the company; but I do not think they can "properly be said to be officers under the company." The judge then went on to consider the question whether a debenture trustee held a place of profit under the company, and came to the conclusion that he did.

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[12] [1899] 1 Ch. 151, 153.

[13] Ibid. 154.

C. A.
1955

B. JOHNSON & Co. (BUILDERS), *In re.*

Jenkins L.J.

This reasoning seems to me to apply with added force to the case of a receiver and manager for debenture holders appointed by the debenture holders under a power in their debenture, as opposed to being appointed by the company, as were the debenture trustees in *Astley* v. *New Tivoli Ld.*[14]

The question whether a receiver and manager for debenture-holders, such as the defendant Aizlewood was in this case, is a manager of the company within section 333 presents more difficulty. Little light on the meaning of the phrase " manager of " the company " is to be derived from the language of section 333 or from the definition in section 455, or from the slight differences in the language of the earlier enactments to which I have already referred. More significant, to my mind, is the special treatment of receivers and managers under Part VI of the Act of 1948, where they are consistently called receivers or managers of the property of a company and not managers of a company, and are put under special obligations as to accounts. My Lord has already referred to some of the sections, which begin with section 366. I would note the obligations to account imposed by sections 372 and 374 of the Act, and I would note, as particularly apposite in the present case, the provisions of section 375 as to the enforcement of the duty of receivers and managers to make returns, etc. The section provides: " (1) If any receiver or manager of the property of a " company—(*a*) having made default in filing, delivering or " making any return, account or other document, or in . . . " giving any notice, which a receiver or manager is by law " required to file, deliver, make or give, fails to make good the " default within fourteen days after the service on him of a notice " requiring him to do so; or (*b*) having been appointed under the " powers contained in any instrument, has, after being required at " any time by the liquidator of the company so to do, failed to " render proper accounts of his receipts and payments and to " vouch the same and to pay over to the liquidator the amount " properly payable to him; the court may, on an application made " for the purpose, make an order directing the receiver or " manager, as the case may be, to make good the default within " such time as may be specified in the order."

That section thus gives the court a measure of control, exercisable in a summary manner, against a receiver or manager of the property of a company, and thus it could not be said that, on the footing that such receivers and managers are not within the provisions of section 333, there is no summary method of compelling them to discharge their duties and to render proper accounts.

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[14] [1899] 1 Ch. 151.

Finally, on this group of sections, I would refer to section 370, which provides: " (1) Where a receiver or manager of the property " of a company has been appointed, every invoice, order for goods " or business letter issued by or on behalf of the company . . . " shall contain a statement that a receiver or manager has been " appointed." The significant part of the section for the present purpose is subsection (2), which states: " If default is made in " complying with the requirements of this section, the company " and any of the following persons who knowingly and wilfully " authorizes or permits the default, namely, any officer of the " company, any liquidator of the company and any receiver or " manager, shall be liable to a fine of twenty pounds."

It is to be observed that express separate reference is there made to " any receiver or manager," although the list of persons liable also includes " any officer of the company," which expression, as I have already mentioned, is defined in section 455 as including " a director, manager or secretary." That suggests that a receiver or manager is treated as distinct from a manager of the company, at all events so far as section 370 is concerned.

These indications, for what they are worth, suggest that the Act regards the receiver and manager of the property of a company as in a special category, distinct from that of a manager of a company. But the decisive consideration, to my mind, is that the phrase " manager of the company," prima facie, according to the ordinary meaning of the words, connotes a person holding, whether de jure or de facto, a post in or with the company of a nature charging him with the duty of managing the affairs of the company for the company's benefit; whereas a receiver and manager for debenture holders is a person appointed by the debenture holders to whom the company has given powers of management pursuant to the contract of loan constituted by the debenture, and, as a condition of obtaining the loan, to enable him to preserve and realize the assets comprised in the security for the benefit of the debenture holders. The company gets the loan on terms that the lenders shall be entitled, for the purpose of making their security effective, to appoint a receiver with powers of sale and of management pending sale, and with full discretion as to the exercise and mode of exercising those powers. The primary duty of the receiver is to the debenture holders and not to the company. He is receiver and manager of the property of the company for the debenture holders, not manager of the company. The company is entitled to any surplus of assets remaining after the debenture debt has been discharged, and is entitled to proper accounts. But the whole purpose of the receiver and manager's appointment would obviously be stultified if the company could claim that a receiver and manager owes it any duty comparable to the duty owed to a company by its own directors or managers.

In determining whether a receiver and manager for the debenture holders of a company has broken any duty owed by him to the company, regard must be had to the fact that he is a receiver and manager—that is to say, a receiver, with ancillary powers of management—for the debenture holders, and not simply a person appointed to manage the company's affairs for the benefit of the company. A receiver without powers of management would, I apprehend, clearly be outside section 333, and it is difficult to see why superadded powers of managing the property comprised in the security should bring him within it.

The duties of a receiver and manager for debenture holders are widely different from those of a manager of the company. He is under no obligation to carry on the company's business at the expense of the debenture holders. Therefore he commits no breach of duty to the company by refusing to do so, even though his discontinuance of the business may be detrimental from the company's point of view. Again, his power of sale is, in effect, that of a mortgagee, and he therefore commits no breach of duty to the company by a bona fide sale, even though he might have obtained a higher price and even though, from the point of view of the company, as distinct from the debenture holders, the terms might be regarded as disadvantageous.

In a word, in the absence of fraud or mala fides (of which there is not the faintest suggestion here), the company cannot complain of any act or omission of the receiver and manager, provided that he does nothing that he is not empowered to do, and omits nothing that he is enjoined to do by the terms of his appointment. If the company conceives that it has any claim against the receiver and manager for breach of some duty owed by him to the company, the issue is not whether the receiver and manager has done or omitted to do anything which it would be wrongful in a manager of a company to do or omit, but whether he has exceeded or abused or wrongfully omitted to use the special powers and discretions vested in him pursuant to the contract of loan constituted by the debenture for the special purpose of enabling the assets comprised in the debenture holders' security to be preserved and realized. That seems to me to be an issue wholly outside the scope of section 333.

Accordingly, I agree with my Lord that the proceedings under section 333 cannot lie against Mr. Aizlewood in respect of his receivership and managership of the company, and that on that ground he is entitled to succeed in his appeal. As to the other matters which have been considered by Evershed M.R. in the case of Mr. Aizlewood, and as to the claim against the liquidator, I entirely agree with all that my Lord has said, and find nothing further that I can usefully add. Accordingly, I agree that both appeals should be allowed.

Parker L.J. I also agree that these appeals should be allowed, and would only add a few words on the first point whether a receiver with powers of management is within the class of persons whose conduct can be the subject of an examination under section 333 of the Companies Act, 1948. One thing, at any rate, is clear, and that is, that this section, like corresponding sections in earlier Acts, gives no new rights: it merely enables certain claims to be dealt with summarily in the winding up. Accordingly, one would not expect to find a class of persons included whose duty, like that of a receiver and manager, is primarily, at any rate, to a third party, the mortgagee, when there is no means of bringing in the mortgagee as a party.

Turning to the wording of the section itself, if a receiver and manager is included, it can only be because he comes within the words "any officer of the company" or the word "manager." So far as the expression "officer" is concerned, this is defined by section 455 of the Act as including "a director, manager or "secretary." No doubt a person who, in fact, manages is a "manager" within that definition, provided, and provided always, that he does so by virtue of some office which he holds in the company. But any work of management done by a receiver, though done as agent, is not done by virtue of any office that he holds in the company; and this is so whether he is appointed by the court or out of court. Moreover, the contrary was but faintly argued. Indeed, the main argument raised by Mr. Blackledge was based on an acceptance of the view that a receiver and manager is not within the definition of "officer." Granted that he is not (so runs the argument), yet "manager" in section 333 itself must be used in a different and wider sense than where it appears in the definition, namely, as meaning someone who manages in the widest sense, even though not an officer. Looked

C. A.
1955

B. JOHNSON & Co. (BUILDERS), *In re.*

Parker L.J.

at in this way, the word is wide enough, so it is said, to embrace a receiver and manager.

However plausible this argument may be at first sight, it must, I think, fail when the history of the section is considered. Thus, the wording of section 333 is to be found in very similar form persisting in successive Acts since 1862; whereas the definition of "officer" appears for the first time in the Act of 1948. Further, the argument for a distinction between the meaning of "manager" in the section and in the definition goes when it is realized that "director" also appears in both places. What, however, in my judgment, is decisive of the case is that any work of management done by a receiver is not done as manager of the company. The powers of management are ancillary to his position as receiver, and, in exercising those powers, he is not acting as manager of the company but as manager of the whole or part of the property of the company. This distinction is, as it were, underlined by the Act itself. (See the group of sections in Part VI of the Act, where the expression "receiver or manager "of the property of the company" is used throughout.) In my judgment, it is clear that a person occupying the position of Mr. Aizlewood in the present case is not a "manager" or "officer" within the section.

Appeals allowed. Summonses dismissed.

Solicitors: *Hewitt, Woollacott & Chown for Weightman, Pedder & Co., Liverpool; Arkle & Darbishire, Liverpool; J. Frodsham & Sons, Prescot.*

B. A. B.

C. A.
1955
May 9, 10.

Evershed M.R., Hodson and Romer L.JJ.

ATTORNEY-GENERAL *v.* PARSONS AND OTHERS.

[1955 A. No. 625.]

Mortmain—Lease—Forfeiture to Crown—Onerous covenants—Liability of Crown as lessee—Inquisition—Whether necessary before entering on forfeiture—Queen's Remembrancer Act, 1859 (22 *&* 23 *Vict.* c. 21)*—Mortmain and Charitable Uses Act,* 1888 (51 *&* 52 *Vict.* c. 42), *s.* 1.

Damnosa hereditas. Landlord and Tenant—Covenant—Covenants by landlord—Whether liable before entry. Judicial Precedent—Court of Appeal decision—Per incuriam—New argument—Inconsistent with decision—Argument not maintainable.

The effect of *Morelle Ld.* v. *Waterworth* [1955] 1 Q.B. 1; [1954] 2 All E.R. 673 (approved in *Morelle Ld.* v. *Wakeling* [1955] 2

Q.B. 379; [1955] 1 All E.R. 708) was that (1) a short unexpired residue of a term of years in land was within the scope of the Mortmain and Charitable Uses Act, 1888 (as amended), s. 1; (2) the interest in the land was thereby automatically and immediately from the date of the purported assurance forfeited so as to vest in Her Majesty without any necessity for any inquisition held or office found, as would or might have been requisite under the old law, and without any other step on the part of Her Majesty by way of acceptance, entry or otherwise; (3) the Crown thereupon became, without more, entitled to all the benefits of the leases under which the land was held and also subject to all the burdens by way of liability for rent and covenants imposed thereby.

On February 21, 1953, an Irish company was registered at the Land Registry as proprietor for valuable consideration of leasehold premises held under a lease of 99 years expiring in 1957. The company had been incorporated in the Republic of Ireland and had not delivered to the registrar of companies any documents for registration under Part X of the Companies Act, 1948, nor had it been granted a licence to hold land in mortmain. The leaseholds had accordingly become forfeited to the Crown by virtue of section 1 of the Act of 1888.

The Crown claimed that it was not liable on the covenants in the lease, since (1) a damnosa hereditas might always be disclaimed; and there must be an inquisition before the Crown might enter upon forfeiture; (2) it was not liable on the covenants until entry:—

Held, that, although those arguments were not raised in the *Morelle* cases, whatever might be the general validity of the arguments, they were incompatible in their present application with the decision in those cases; and that, accordingly, the Crown was liable on the covenants in the lease.

Morelle Ld. v. *Waterworth* [1955] 1 Q.B. 1; [1954] 2 All E.R. 673 and *Morelle Ld.* v. *Wakeling* [1955] 2 Q.B. 379; [1955] 1 All E.R. 708 applied.

Decision of Harman J. affirmed.

APPEAL from Harman J.

By a lease dated August 11, 1862, certain houses in Greenside Road and Goldhawk Road, Hammersmith, were demised to John Murray for a term of 99 years from September 29, 1858, subject to the rent and to the lessee's covenants thereby reserved and contained. The freehold reversion expectant on the term granted by the lease formed part of the trust premises of the Odiham Consolidated Charities and was vested in the Official Trustee of Charity Lands. The first 15 defendants were the managing trustees of the charity.

The leasehold title to the demised premises was registered at H.M. Land Registry with good leasehold title. On February 21, 1953, Arffe Ld., the 16th defendant, was registered as proprietor of the demised premises at the Land Registry as a transferee for valuable consideration.

Arffe Ld. was a company incorporated in the Republic of Ireland with its registered office in Dublin. The company had not delivered to the registrar of companies any documents for registration under Part X of the Companies Act, 1948, nor had it been granted a licence to hold land in mortmain.

The defendants, the managing trustees of the charity, alleged that there had been breaches of the covenants contained in the lease of 1862 and that the leasehold term created by the lease had by virtue of section 1 of the Mortmain and Charitable Uses Act, 1888,[1] become vested in the Crown. The Crown had not entered upon or otherwise taken possession of the demised premises nor had any commission of inquiry in mortmain been issued.

The Attorney-General took out a summons asking, 1. whether upon the true construction of the Mortmain and Charitable Uses Act, 1888, and of the Mortmain and Charitable Uses Act, 1891, and of the Land Registration Act, 1925, the demised premises: (a) were vested in the defendant Arffe Ld. for the unexpired residue of the term of 99 years granted by the lease; or (b) ought to be deemed to be so vested; or (c) were vested in Her Majesty for the unexpired residue of the term; 2. "if "the answer to paragraph 1 (c) of the summons be affirmative "whether upon the true construction of the Mortmain and "Charitable Uses Acts, 1888 and 1891, and of the Queen's "Remembrancer Act, 1859, Her Majesty the Queen is in the "events which have happened now liable under the lessee's "covenants contained in the said lease notwithstanding that "Her Majesty has not nor has anyone on her behalf entered into "possession of any part of the said land nor has there been "any inquisition made or office found in relation to Her Majesty's "title to the said land or any part thereof."

The defendants to the summons were the managing trustees of the charity and Arffe Ld.

Harman J. held that he was bound by the decisions of the

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[1] Mortmain and Charitable Uses Act, 1888, s. 1: "(1) Land shall not "be assured to or for the benefit of, "or acquired by or on behalf of, any "corporation in mortmain, otherwise "than under the authority of a licence "from Her Majesty the Queen, or "of a statute for the time being in "force, and if any land is so assured "otherwise than as aforesaid the "land shall be forfeited to Her "Majesty from the date of the assurance, and Her Majesty may enter "on and hold the land accordingly: ". . ."

Court of Appeal in *Morelle Ld.* v. *Waterworth* [2] and *Morelle Ld.* v. *Wakeling* [3] to declare that the property was vested in Her Majesty for the residue of the term for which it was held. He then proceeded to consider the second question raised by the summons, namely, whether, notwithstanding the vesting of the term in the Crown, it could be made liable without having entered upon the demised premises or in any way assented to the vesting. In the course of his judgment Harman J. considered the decisions on the position of executors in relation to leases, which are referred to in the judgment of Evershed M.R.,[4] which he (Harman J.) held did not assist the Crown. He also considered the decisions in *Turner* v. *Richardson* [5] and *Copeland* v. *Stephens* [6] on the position of the assignees of a bankrupt under the old law in respect of leases and held that they had nothing to do with the question before him. After referring to *Williams* v. *Bosanquet* [7] Harman J. concluded his judgment as follows: "It is true "that the Crown has not accepted the forfeiture which here has "the same effect, according to the Master of the Rolls in *Morelle* "*Ld.* v. *Wakeling*,[8] as if there had been a legal assignment of "the term to it. As it has not accepted it, it would, I suppose, "be an argument—and I should have thought a strong argument "—to say that acceptance by the Crown is necessary before the "term could pass. That really was what Mr. Buckley was in "part arguing here. That is not open to him because the Court "of Appeal has said that the term has vested and has overridden "the question whether acceptance be necessary or not. The "term then being vested by the forfeiture by operation of law "in the Crown the question of acceptance is gone and all that "remains is the question of whether an entry into possession is "necessary.

"In my judgment the fact that an executor is only liable de "bonis testatoris until entry and the fact that the old assignee "in bankruptcy was held not to have the term vested in him at "all do not provide any reliable guides on this question. It is "evident, in my opinion, on the cases, so far as they have been "cited to me, that although when an original lease is made it is "not perfected in the absence of assent until entry by the lessee "who until then has only an interesse termini, yet once the term

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[2] [1955] 1 Q.B. 1; [1954] 2 All E.R. 673.
[3] [1955] 2 Q.B. 379; [1955] 1 All E.R. 708.
[4] Post, pp. 678–9.
[5] (1806) 7 East 335.
[6] (1818) 1 B. & Ald. 593.
[7] (1819) 1 Brod. & Bing. 238.
[8] [1955] 2 Q.B. 379.

"is properly created in the first lessee it will pass by assignment "without any entry on the part of the assignee. That is what "has happened here if the Court of Appeal, as I must assume, "rightly decided the *Morelle* cases.[9] I conclude, therefore, that "this point also must be decided against the Crown.

"I propose to declare on question 2 that Her Majesty is now "liable under the lessee's covenants."

The Attorney-General appealed.

At the hearing before the Court of Appeal leave was given to add as defendant the Official Trustee of Charity Lands in whom the freehold reversion was vested. It was conceded that, if Her Majesty could disclaim, she must be treated as having done so by counsel in the course of the argument on appeal.

Denys Buckley for the Attorney-General. The first question raised by the summons was determined in *Morelle Ld.* v. *Waterworth*[10] and *Morelle Ld.* v. *Wakeling*[11] and it would be idle to argue in this court that Harman J.'s decision was wrong and that the demised premises had not vested in Her Majesty for the unexpired residue of the term for which they were held. The Crown, however, will, if opportunity occurs, argue that question in the House of Lords.

With regard to the second question raised by the summons, it is submitted that, notwithstanding that the term has vested in Her Majesty, the Crown is not liable under the covenants contained in the lease unless some act has been done recognizing the forfeiture. The law will not compel anyone to accept a transfer of property. Where a term vests in any person by operation of law, he is not liable on the covenants unless he accepts the benefit of the term. Until a lessor can show that an assignee of the term has accepted the assignment, the lessor cannot sue the assignee on the covenant in the lease. For the last 300 years the personal representative of a deceased lessee has been liable in his representative capacity to the extent of the deceased's assets, but he has not been held liable personally de bonis propris unless he has, in fact, entered on the demised premises. The legal estate vests in a personal representative but he does not become under any personal liability unless he enters on the premises, except to the extent of the deceased tenant's assets. He is not liable by virtue of privity of estate. The position of a personal representative illustrates the difference between the rights which arise by privity of estates between the original parties to a lease and those against statutory assigns where there must be not only privity of estate but also acceptance of the term. Mere vesting by operation of law is not sufficient of itself to give rise to liability; there must be both a vesting and an acceptance of the vesting.

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[9] [1955] 1 Q.B. 1; [1955] 2 Q.B. 379.

[10] [1955] 1 Q.B. 1.

[11] [1955] 2 Q.B. 379.

It is clear from the authorities that the law will not force a man to accept onerous property. [Reference was made to Sheppard's Touchstone, 7th ed., vol. II, p. 285, chap. 15; Davidson's Precedents in Conveyancing, 3rd ed., vol. 5, part II, p. 661; *Sackvill* v. *Evans*[12]; *Bolton* v. *Cannon*,[13] and *Buckley* v. *Pirk*.[14]]

The Crown does not intend to take the benefit of the forfeiture but the argument must proceed on the footing that there was a forfeiture. Section 1 of the Mortmain Act of 1888 says that the land shall be forfeited to Her Majesty. The assurance by the grantor is effective but the land is forfeited. Her Majesty might have granted a retrospective licence to the company to hold land and, in that event, the legal estate in the land would have revested in the grantee. It is not inconsistent to say that the Crown has power to waive any forfeiture: *Wollaston* v. *Hakewill*.[15] Although by operation of law the Crown is the assignee of the term, that does not prevent the Crown refusing to accept the term: *Stratford-upon-Avon Corporation* v. *Parker*.[16] For the Crown to be liable under the lease, it must have entered and taken the benefit of it. If the Crown elects not to take the benefit of leases, it is then under no liability. The decisions in respect of the property of a bankrupt are not helpful. It appears from *Copeland* v. *Stephens*[17] that, where commissioners had executed an assignment in bankruptcy, it did not vest a term in the assignee until he accepted it. [Reference was made to *Williams* v. *Bosanquet*.[18]] The rule that entry is necessary to impose liability under the covenants in a lease does not apply where valuable consideration has been given but only to cases of voluntary assignment or assignment by operation of law.

It appears from Chitty's Prerogatives of the Crown, Chap. XII, pp. 246, 248 and 249, that the Crown cannot enter where there has been a forfeiture, unless there has first been an inquisition. There is a distinction between the effect of the vesting of a legal estate and entry. The Queen's Remembrancer Act, 1859,

[12] (1674) Freem.K.B. 171.
[13] (1674) Freem.K.B. 393.
[14] (1695) 1 Salk. 316.
[15] (1841) 3 Man. & G. 297.
[16] [1914] 2 K.B. 562.
[17] 1 B. & Ald. 593.
[18] 1 Brod. & Bing. 238.

s. 25, abolished the need for an inquisition before entry by the Crown, but that Act was limited to the case of freeholds. That section has no relevance to this case. [Reference was made to the Escheat (Procedure) Act, 1887, and to Robertson's Law and Practice of Civil Proceedings by and against the Crown, p. 431.]

There is nothing in the decision in the *Morelle* cases [19] which prevents the Crown disclaiming, and it has now been indicated that the Crown intends so to do. These decisions merely establish that the property in the premises has been transferred by operation of law, which has vested the legal estate in the Crown; that vesting leaves the Crown with a right to disclaim.

F. E. Skone James for the first 15 defendants, the trustees of the charity. The Crown's contentions are incompatible with the two *Morelle* decisions,[19] where it was held that the Mortmain Act of 1888 vested the legal estate to which it applied in the Crown. The position is not the same as where there has been an assignment by way of gift. One person cannot force another to take a legal estate unless he agrees. The position of executors is a special case. The effect of the vesting of a legal estate in a mortgagee of a lease appears from the decision in *Williams* v. *Bosanquet*.[20] It is not open to the Crown to say that the legal estate has not vested in it. This being so, there is privity of estate between the Crown and the lessor. At common law where there is privity of estate the liability arises under the covenants in the lease. The fact that the Crown has not gone into possession does not affect the legal consequences of the vesting. Even if the Crown could disclaim, there would be a fresh forfeiture by reason of the disclaimer.

Arffe Ld. was not represented on the appeal.

EVERSHED M.R. Some few years ago ingenious persons conceived the idea of transferring, or purporting to transfer, the unexpired residues of terms of years in residential property in London to companies incorporated in Eire, which companies had neither a licence to hold land in England nor had they availed themselves of the appropriate provisions of the Companies Act, 1948, as to registration, which would have enabled them so to do. One result was *Morelle Ld.* v. *Waterworth*,[1] an action in the county court in which the plaintiff company, Morelle Ld., being a company with the characteristics that I have indicated, sought to recover alleged arrears of rents from occupants of property in London. By way of answer the defendants asserted that by virtue of section 1 of the Mortmain and Charitable Uses Act, 1888, as amended, the interest in the property, which the plaintiff company had purported to acquire, had been absolutely and automatically forfeited to Her Majesty and that therefore the plaintiff company was disabled from suing. The defence succeeded in the county court. The result, according to Harman J., was to startle the legal profession. It may also have startled the plaintiff company, Morelle Ld., who thereupon appealed to this court.

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[19] [1955] 1 Q.B. 1; [1955] 2 Q.B. 379.

[20] 1 Brod. & Bing. 238.

[1] [1955] 1 Q.B. 1; [1954] 2 All E.R. 673.

Since it is in my view important to arrive at a conclusion about what this court decided and what was inherent in the reasoning of the decision, I will read certain passages from the judgments. Singleton L.J., who delivered the first judgment, considered first the question whether a leasehold term of years, of which a short residue remained unexpired, was within the provisions of the Mortmain and Charitable Uses Act at all, and he concluded this part of his judgment thus [2]: " This case falls within the pro-" visions of section 1 (1). The plaintiff company was a company " registered in Eire and not in this country; it had no licence or " authority, and consequently there was a breach of the terms " of section 1 (1) of the Act. It follows from the wording of " the Act that if the land is so assured otherwise than as afore-" said, ' the land shall be forfeited to Her Majesty from the date " ' of the assurance, and Her Majesty may enter on and hold " ' the land accordingly.' The appeal of the plaintiff company " fails."

Later he recited the following passage from the judgment of the county court judge [3]: " ' I am invited to dismiss these " ' actions on grounds urged by Mr. Bagnall that the plaintiff " ' Irish companies have no right to own the properties. Before " ' a company can hold land as part of its permanent possessions " ' a licence in mortmain is necessary: the principal Acts are " ' those of 1888 and 1891. Under those Acts land may not be " ' held by a corporation save by licence from the Crown unless " ' the company is incorporated or registered under the Companies " ' Act. Companies not incorporated or registered have no right " ' to hold land unless they have a licence.' " Singleton L.J. said: " I agree with the county court judge, and, in my view, the " appeal should be dismissed."

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[2] [1955] 1 Q.B. 1, 9.

[3] Ibid. 10.

Denning L.J. said[4]: "I cannot help observing that in this "particular case we have a modern instance of a dead hand. "Here is a foreign company which does not establish any "business office in England and does not register itself in any "way. By so doing it puts itself in a position, if not to defeat "its obligations entirely, at least to make it most difficult for "its dues to be collected from it. It makes it difficult for the "tenant to recover on the landlord's covenants. It makes it "difficult for the rating authority to obtain rates, or the housing "authority to see that the houses are kept in proper condition, "or even for the revenue authorities to obtain their proper taxes. "So far as all those matters are concerned, it is like unto a dead "hand. We have a modern application of the law of nearly "700 years ago. The transfer to this company is void without "a licence from the Queen, and no licence has been granted."

I should here interpolate that (as Mr. Buckley pointed out) by "void" the Lord Justice must have meant that it was liable to be forfeited, because nobody has suggested that the transfer was void in the sense that the estate remained in the transferor. That appears, I think, from the next paragraph, which says: "In "the old days the forfeiture was not automatic, but under the "wording of this statute it is clear that the forfeiture is from "'the date of the assurance,' so that it operates at once without "any entry by the Crown; and the tenant can take advantage "of it, because he is liable to the Crown for the rent from that "date. I agree, therefore, that the appeal should be dismissed." My brother Morris confined himself to expressing his full concurrence with the two judgments already delivered.

In my judgment, then, this court in the first *Morelle* case[5] held that, whatever the effect of the old law as to mortmain was, Parliament had so enacted by the Act of 1888 as amended that: (1) a short unexpired residue of a term of years in land was within the scope of the Act; (2) that the interest in the land which the plaintiff company had purported to acquire had been automatically and immediately from the date of the purported assurance forfeited so as to vest in Her Majesty without any necessity for any inquisition held or office found, as would or might have been requisite under the old law, and without any other step on the part of Her Majesty by way of acceptance, entry or otherwise. In my judgment it was also inherent in the reasoning of the decision of this court in the first *Morelle* case,[5]

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[4] [1955] 1 Q.B. 1, 12.

[5] [1955] 1 Q.B. 1.

(3) that by virtue of the Act of Parliament the Crown thereupon became, without more, entitled to all the benefits of the leases under which the land was held and also subject to all the burdens by way of liability for rent and covenants imposed thereby; and it was not contemplated by the terms of the judgments that the legal estate should be vested in the Crown, but that the reversioners should be unable to enforce against anyone any of the obligations of the leases.

In adding this third point I am aware that I am by way of anticipation rejecting Mr. Buckley's main contention before us. It is true that the Crown was not a party to the first *Morelle* decision,[5] and it is true that Mr. Buckley's main contention, which I will hereafter consider, was not then raised and not therefore, as such, decided. But I am of opinion that such was the effect of the decision in the first *Morelle* case[5] and that it was so regarded by this court in the second *Morelle* case[6] to which I now come.

The result of the first *Morelle* case[7] for obvious reasons raised difficulties for the Crown, and in the second *Morelle* case,[8] pursuant to an opportunity which this court gave, the Attorney-General appeared as amicus curiae (indeed he also asked to be added as a party). In the second *Morelle* case, known as *Morelle* v. *Wakeling*,[8] it was contended by the Attorney-General that the decision in the first *Morelle* case[9] had been arrived at per incuriam. (I should have said that, save for one point which I will mention in a moment, it was not contended that there was any difference on the facts between the two *Morelle* cases.) In particular, the Attorney-General contended that the court in the first *Morelle* case[9] had neglected properly to consider the history of the English law in regard to mortmain and the requirement of that law that any effective forfeiture to the Crown, inter alia, followed only upon the holding of an inquisition and the finding of an office. I add that the argument put before us on the present occasion by Mr. Buckley was also not suggested to us in argument in the second *Morelle* case[10]; but Mr. Buckley has not suggested that the second *Morelle* case,[10] like the first, ought therefore on that ground to be regarded as in any respect decided per incuriam. I add also that in the second *Morelle* case[10] this court rejected the view that any different result should be reached because the land in question was registered land and because the Irish company had been registered in respect thereof with a possessory leasehold title, and no point on this matter, so far as I know, now remains outstanding.

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[5] [1955] 1 Q.B. 1.

[6] [1955] 2 Q.B. 379; [1955] 1 All E.R. 708.

[7] [1955] 1 Q.B. 1.

[8] [1955] 2 Q.B. 379.

[9] [1955] 1 Q.B. 1.

[10] [1955] 2 Q.B. 379.

I now proceed to read from certain passages in the judgment of the Court of Appeal, which consisted of my brethren Denning, Jenkins, Morris and Romer and myself, and which was read by me. I stated the questions for determination in the first *Morelle* case thus [11]: "In the case just mentioned . . . two distinct points were "raised. First, was the assurance to the plaintiff company of "the unexpired residue of a term of years in house property in "London an assurance of land in mortmain within the terms of "section 1 of the Mortmain and Charitable Uses Act, 1888? "Secondly, if so, was the term so assured automatically for-"feited to the Crown by virtue of the same subsection? Both "these questions were answered affirmatively by this court. "Both questions turned on the proper interpretation of the "relevant terms of the Mortmain and Charitable Uses Acts, "1888 and 1891."

I turned next to consider the Crown's application, to which we did not in the end accede, to be added as a party. I said [12]: "We decided to postpone our decision upon this application "until we had heard the argument upon the whole case, and we "shall deal hereafter with it. It may be stated, however, that "though the apparent interest of the Crown would be to support "the Court of Appeal's conclusion in the first *Morelle* case,[13] in "reality this is found not to be so: for, if the leasehold terms "in question have vested in the Crown, then the Crown would "presumably be liable upon the covenants contained in the "leases, including the covenants relating to repairs and delivery "up. As we have stated, the alleged interests of the plaintiff "company in the present case and in the first *Morelle* case [13] "are interests in the unexpired residue of terms of years."

Reading further the judgment of the court, I summarized the arguments which were put forward or intimated by the Attorney-General, which included [14]: "(c) the penalty for infringing the "provisions of the law relating to mortmain was liability to for-"feiture (following a distinct and established procedure) and not "an automatic forfeiture; (d) moreover, the right of forfeiture in "the Crown was subject to the prior like rights, in gradation,

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[11] [1955] 2 Q.B. 395.

[12] Ibid. 396.

[13] [1955] 1 Q.B. 1.

[14] [1955] 2 Q.B. 398.

" of the mesne lords, if any; (e) the subject-matter forfeited was " in all cases the fee itself."

The judgment then proceeded to state the conclusion that, notwithstanding that these points were points of great difficulty upon which on the former occasion it had been suggested that counsel had not been fully instructed, nonetheless we could not say that the first *Morelle* decision [15] had been arrived at per incuriam.

The judgment then passed to a consideration of the second point raised, which I have already mentioned, namely, that there was a distinction in the second *Morelle* case [16] by virtue of the fact that the land was registered. The judgment states as follows: " For these reasons the fact that the present case con- " cerns registered land does not, in our opinion, afford any valid " ground for distinguishing the first *Morelle* case.[17] The express " provisions of the Act relating to the effect of registration of a " disposition for valuable consideration, that is to say (so far as " leaseholds are concerned) the provisions of section 23, include " no provision which can properly be construed as freeing the " land from the forfeiture incurred by the registered transfer to " the plaintiff company. Accordingly, by virtue of section 80 " of the Act, such forfeiture took effect upon the registration of " the transfer, just as it would have done on the execution and " delivery of an assignment of unregistered leaseholds, and, as " we are bound to hold following the first *Morelle* case,[17] took " immediate and automatic effect without any act or proceeding " on the part of the Crown to assert or establish it. This for- " feiture being, as we have held, unaffected by the provisions of " the Land Registration Act, it follows that it took effect without " rectification of the register and was not suspended pending an " order for rectification or contingent upon such an order being " obtained."

The result of the two *Morelle* cases has been unfortunate for the Crown, for it clearly appears, in my view, that as a consequence in all cases in which the unexpired residues of terms of years have been transferred, or purport to have been transferred, to Irish companies having no licence in mortmain and not having availed themselves of the powers of registration under the Companies Act, the Crown would be held, or would be likely to be held, liable to the reversioners upon the covenants as to rents, repairs, etc. So has opened the third chapter of events.

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[15] [1955] 1 Q.B. 1.

[16] [1955] 2 Q.B. 379, 413.

[17] [1955] 1 Q.B. 1.

In the present proceedings, having received demands for rent and for compensation for breach of covenants in respect of other land, namely, land at Hammersmith, which had been the subject of a transfer or purported transfer to another Irish company called Arffe Ld., the Crown took the initiative and issued an originating summons. The parties to the summons were, as to defendants numbers 1 to 15, the managing trustees of a certain charity. The land itself, that is, the reversion subject to which the lease in question is held, is vested in the Official Trustee of Charity Lands under a scheme. The last defendant, No. 16, is the Irish company, Arffe Ld., which has not appeared in this court. It was suggested that, having regard to the nature of the questions raised, it might be desirable that the person in whom the legal estate of the freehold was vested should be added, and liberty has been given to add the Official Trustee so that his name could be added to Mr. Skone James' brief.

[His Lordship stated the questions raised by the Attorney-General upon this summons and continued:] Having regard to the decision of this court in the first and second *Morelle* cases Harman J. answered the first question in the terms of paragraph 1 (c) of the summons, and Mr. Buckley has admitted, while preserving all the arguments intimated in the second *Morelle* case,[18] that this court must give a like answer to that question.

But Mr. Buckley has also raised a further argument which, as I have already said, was not made in the earlier two cases and under that head he has put two points before us. The first point is based on the general proposition that a man cannot irrevocably foist upon an unwilling or unconscious grantee gifts or other transfers of property, particularly damnosae hereditates such as interests in lands subject to onerous covenants; and that the proposed recipient is always able, not only to express his fear of the Greeks and their bearing of gifts, but also by appropriate disclaimer to repudiate the proposed disposition altogether, and so either to prevent the vesting taking effect or at least to cause a revesting in the proposing assignor. In case that point is not sufficiently raised by the form of question 2 of the summons, it was also agreed that any necessary amendment could be made to its form. It was further conceded by Mr. Skone James that the necessary disclaimer must be treated as having been made on Her Majesty's behalf at least by Mr. Buckley's argument in this court.

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[18] [1955] 2 Q.B. 379.

In support of that proposition Mr. Buckley referred to passages in Sheppard's Touchstone, 7th ed., vol. II, 285, chap. 15, entitled "Of a Feoffment, Gift, Grant, and Lease." I take two short extracts from that passage as sufficient for the purposes of my judgment. Thus, at the beginning it is said: "for "no estate can be made to a man of any thing in fee simple, "for life, or otherwise, against his will; and therefore, by his "disagreement or refusal of it, the estate itself, and the deed "whereby it is conveyed, may become void;". Then later: "And if it be but a lease for years that is made, he may waive "and avoid that by word of mouth in the country, as well as a "gift of goods, or an obligation delivered to his use."

Mr. Buckley also cited to us a considerable passage in a footnote in Davidson's Conveyancing Precedents, 3rd ed., vol. 5, part II, p. 661. Again I will confine myself to a selection of two short passages. First: "Every estate given by "deed, will, or otherwise is supposed, prima facie, to be beneficial to the donee; consequently it is also supposed, until "there is proof to the contrary, that every estate is accepted "by the donee. But every donee is at liberty to refuse the "gift, for the law will not, of course, compel a man to take "an estate against his will." And then the annotator refers to the passage in Sheppard's Touchstone which I have already read. At the bottom of p. 663 I find: "For it is of no moment "at what time evidence of the disclaimer is committed to "writing, the actual disclaimer or refusal of the estate will be "held to have been made at the time of the gift, if the disclaiming party has never done any act inconsistent with the "refusal of the estate."

Whatever may be the validity and scope of this argument, as a general proposition its present application is in my view necessarily negatived in the present case by the decisions, right or wrong, in the two *Morelle* cases.[19] As I have already said, the effect in such a case as the present of the Mortmain and Charitable Uses Acts, 1888 and 1891, as interpreted by this court, is that the land in question vests automatically and irrevocably in Her Majesty, and it is in my judgment incompatible with those decisions and the reasoning on which they are based that Her Majesty could thereafter disclaim and cause the unexpired terms either to remain vested, or to be revested, in the Irish companies, which the court held to be incapable of acquiring such interests.

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[19] [1955] 1 Q.B. 1; [1955] 2 Q.B. 379.

It is also in my view incompatible with those decisions and their reasoning that the vesting in Her Majesty should be dependent or conditional upon any prior holding of an inquisition or finding of an office. That result follows inevitably from the passages which I have read from the judgments on the automatic nature of the forfeiture. As Romer L.J. observed during the argument, there would indeed appear to be, in such a case as the present, no question which could be the subject of any such inquisition.

On this matter again I agree with Harman J. notwithstanding the passage (which the judge quoted) from Robertson's book on the "Law and Practice of Civil Proceedings by and against the "Crown," p. 431. The passage cited by the judge was: "The "principle"—that is the principle that there must be still an inquisition before the Crown may enter upon forfeiture—"would "seem still to apply to land of alien corporations, and any other "corporations, who are compelled to obtain a licence in mortmain "to hold land and have not done so, and it does not appear to the "author that the terms of the Mortmain and Charitable Uses Act, "1888, s. 1, . . . which confer a right of entry on the Crown in "such a case, do away with the necessity of an inquisition." Harman J. continued after reading that passage: "If this were "right, the Crown would have no more than an interesse termini "in the property, but I do not think I am free to decide the point "in this way having regard to the decision of the Court of Appeal "that the forfeiture was automatic, which seems to assume that "not only the possible rights of mesne lords are overridden, but "that an inquisition or office cannot be necessary." I think the same answer applies to the passage to which Mr. Buckley referred us from Chitty on the "Prerogatives of the Crown," p. 246.

In the circumstances it is unnecessary for me to express any view whether, in any case, the necessity for an inquisition is removed by section 25 of the Queen's Remembrancer Act, 1859, referred to in the second question in the summons, or upon the point made by Mr. Buckley thereunder that, in the case of an interest such as is here in question, namely, the unexpired residue of the term, the word "re-entry" in that section is in any case inappropriate.

I also agree with Harman J. that cases cited by Mr. Buckley on the interest taken by executors (*Sackvill* v. *Evans*,[20] *Buckley*

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[20] (1674) Freem.K.B. 171.

v. *Pirk*,[21] *Wollaston* v. *Hakewill*,[22] and *Stratford-upon-Avon Corporation* v. *Parker*[23]) do not advance Mr. Buckley's argument. These cases no doubt establish that an executor of a lessee or an assignee in possession of a term of years will only be liable upon the covenants to the extent of the testator's assets, that is, de bonis testatoris, unless he has taken the further step of personally entering into possession. In the latter case he will be fully liable personally de bonis propriis in an action at common law in the debet as well as in the detinet. As Harman J. observed, the case of executors is indeed somewhat special, for it is natural enough that, if a testator had assumed liability under a lease, that liability should pass to his estate. There is no doubt that the property is vested in the executor. The question is, according to the executor's conduct, whether it is so vested in him in his representative character only or personally in the full and ordinary sense.

But Mr. Buckley also submitted a second point of some force and, as presented by him, if I may say so, some attraction; namely, that although the terms in question were, in accordance with the judgments in the first and second *Morelle* cases,[24] vested at law in Her Majesty, nevertheless the Crown was not liable upon the covenants, unless and until possession had been taken or at least some step taken showing an intention to assume and enjoy the benefits of the leases. As I have already said, this point was also not suggested on the occasion of the hearing of the second *Morelle* case[25] and I accordingly note the use of the word "presumably" in the passage I earlier read from the judgment of the court.

The point has clearly a significance, and a marked significance, upon the general question whether, and if so on what terms and conditions, the Mortmain and Charitable Uses Acts apply to such cases as the present; and the point will of course be open, if this case should hereafter go to the House of Lords. But, as I have said, I think that we should take the point as really concluded against Mr. Buckley by the necessary implications in the earlier decisions. I cannot think that it could be fairly contemplated from the terms of those decisions that the leasehold interests were vested as it were in a state of suspense in the Crown, and that the Crown were not entitled to the benefit nor subject to the liabilities of the leases. Such a result would, in my judgment, produce indeed a state of unreality.

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[21] (1695) 1 Salk. 316.

[22] (1841) 3 Man. & G. 297.

[23] [1914] 2 K.B. 562.

[24] [1955] 1 Q.B. 1; [1955] 2 Q.B. 379.

[25] [1955] 2 Q.B. 379.

Taking that view, it is strictly unnecessary for me to say more; but I think it right to add that, as at present advised, I am disposed to agree with Harman J. that the liability towards the reversioners follows from the vesting, is a result of the privity of estate, and that possession is not requisite to give rise thereto. I found myself, as did the judge, upon the decision in *Williams* v. *Bosanquet*.[26] That was a case in which one who was possessed of a term of years assigned it by way of mortgage and as security for money advanced, and the question was whether the mortgagee became liable upon the covenants in the lease. Dallas C.J., delivering the judgment of the court, said this[27]: "And so, by Lord Holt, in *Cook* v. "*Harris*,[28] 'the assignee has the estate in him before entry, "'though not to bring trespass,' that being an action founded "upon possession; but as between lessor and lessee, with respect "to rent, this reason does not apply, for, the right to the rent "and the liability to pay, vest by the lease and not by the "occupation." Later, after referring to certain other cases, the Chief Justice observed[29]: "It has been further said, that "there is no privity of estate, because possession was not taken; "nor privity of contract, in respect of which the original lessee "would be liable without possession. But it is not so; for there "is privity of estate, if legal possession, that is, acceptance "of the thing assigned by acceptance of the assignment, be "equivalent to actual entry, which it is, if there be justness "in the observations already made; and, even as to privity "of contract, there is such privity also, for the contract of the "lessor is with the lessee and his assigns . . ."

As I have said, if it were necessary, I should be disposed as at present advised to agree with Harman J. that, according to the decisions in the first and second *Morelle* cases,[30] there has been such acceptance on behalf of Her Majesty, by virtue of the forfeiture for which the statute provides, as renders beneficial possession unnecessary to impose on Her Majesty the liabilities of the leases. As I have earlier said, however, in my judgment the second point, like the first, is really concluded against Mr. Buckley in this court by the earlier decisions, and I therefore think that the appeal should be dismissed.

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[26] (1819) 1 Brod. & Bing. 238.
[27] Ibid. 257.
[28] (1698) 1 Ld.Raym. 367.
[29] 1 Brod. & Bing. 238, 263.
[30] [1955] 1 Q.B. 1; [1955] 2 Q.B. 379.

I add that I have not referred specifically to the bankruptcy cases to which Mr. Buckley alluded before Harman J. because, as I understood Mr. Buckley in this court, he did not think that those cases really advanced his argument.

HODSON L.J. I agree with that. In his judgment Harman J. referred to *Turner* v. *Richardson*,[31] a case under the old bankruptcy law, which indicated that the assignees of a bankrupt are not bound to accept a term of years which may be burdensome instead of profitable to their trust, the position being that under the old law the property did not vest in the Commissioners of Bankruptcy at all. As I understood him, Mr. Buckley conceded that these cases did not really assist the Crown.

ROMER L.J. I also agree that the appeal should be dismissed and have only a word or two to add. In the first *Morelle* case [32] this court held that a lease similar to the one which is in question in the present case was forfeited to the Crown from the date of the assignment to the Irish company which was there concerned. Having regard to the view which the court took of the effect of section 1 of the Act of 1888, I do not think that it can be contended before us that the Crown can subsequently by disclaimer divest itself of the legal interest, which became vested in it by virtue of the forfeiture, because the court in the first *Morelle* case [32] held that the term passed to the Crown automatically and at once, and clearly took the view, in my opinion, that it so passed once and for all.

As the Master of the Rolls has said, it was not suggested in either of the two *Morelle* cases that, if the forfeiture did operate to vest the term in the Crown, it was only the bare legal interest that so vested and that the Crown had what Hodson L.J. described yesterday as a locus poenitentiae in which to rid itself of the interest by disclaimer. It seems to me, however, that for this court to hold today that such is the true position would nullify the decision of the court in the first *Morelle* case,[32] which was in effect (as particularly appears, I think, from the judgment of Denning L.J. and also from the comments on the first *Morelle* case [32] which appear in the decision of this court in the second *Morelle* case [33] and to which my Lord has referred) that upon the forfeiture operating the Crown became the landlord of the subtenants. If, in fact, the view was—it did not arise there for actual decision—that the Crown became the landlord, quite clearly it could not now say before this court that it can rid itself of its liabilities as landlord by disclaiming.

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[31] (1806) 7 East 335.

[32] [1955] 1 Q.B. 1.

[33] [1955] 2 Q.B. 379, 396.

Further, as the Master of the Rolls has indicated, the relevant passages in the judgments in both the *Morelle* cases show that the Crown cannot before this court contend, because it is not open to it so to contend, that entry is necessary before liability attaches to the Crown under the lessor's covenants in the lease.

It is clear that the arguments which Mr. Buckley has addressed to us in this case may well be relevant to the main issue which appears now in question 1 of the present originating summons—namely, the question whether the legal interest, or any interest in fact, in the events which have happened, vested in the Crown at all. If that matter is presented for debate to the House of Lords, no doubt those arguments will be considered. In those circumstances, I would prefer to express no opinion as to the validity of the view which Mr. Buckley submitted to us, either that the Crown, if there was a vesting, could subsequently divest its interest, or that in any event it became under no effective liability by reason of the fact that it never accepted the lease or entered upon the benefits of the demise.

Nor do I wish to express any opinion about the applicability to the present position of the Queen's Remembrancer Act, 1859, save only to say that, as in the first *Morelle* case,[34] the decision of this court was that the forfeiture was instant and automatic, the implication is that the court was expressing the view that no inquisition held or office found was necessary. As I say, for my part, I prefer to express no opinion on that or the other matters which Mr. Buckley suggested in the Crown's case before us.

Having regard to the decisions of this court in the first *Morelle* case,[34] as explained or expounded in the second *Morelle* case,[35] I think that it is not open to this court to accept the submissions which have been put before us and I agree, therefore, that this appeal must fail.

Appeal dismissed. Leave to appeal to the House of Lords.

Solicitors: *Treasury Solicitor; Johnson, Meredith, Hardy & Hutchison, for Lamb, Brooks & Bullock, Basingstoke.*

B. A. B.

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[34] [1955] 1 Q.B. 1.

[35] [1955] 2 Q.B. 379.

In re THE NOTTINGHAM GENERAL CEMETERY CO.

1955
May 12, 18.

Wynn-Parry J.

[1953 No. 00339.]

Company—Winding up—Disclaimer of property—Statutory undertaking—Unregistered company—Cemetery company incorporated by special Act—Application by liquidator to disclaim cemetery—Land burdened with onerous covenants—Whether jurisdiction to grant application—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 323.

The Nottingham General Cemetery Co. was incorporated by special Act of Parliament in 1836 for the purpose of establishing and maintaining a cemetery in Nottingham. The Act prohibited the company from selling or disposing of any of its land which had been consecrated, set apart, or used for the burial of the dead. A private Act of 1923, obtained by the local authority, imposed restrictions on burials in the cemetery. In the result the company sustained losses, and eventually it became clear that it could not continue. Accordingly, a petition for the compulsory winding up of the company as an unregistered company was presented under section 399 of the Companies Act, 1948, and an order on that petition was made on May 11, 1953.

The liquidator sought an order that he be at liberty to disclaim the land constituting the company's cemetery; all implied contracts with holders of grave certificates in respect of graves in the cemetery; and all contracts for the upkeep of graves:—

Held, that the court had jurisdiction to authorize the liquidator to disclaim the property in question, notwithstanding that the company was incorporated by special Act of Parliament to establish and maintain an undertaking for a public purpose, since (1) the land was "burdened with onerous covenants" within the meaning of section 323 of the Companies Act, 1948 [1]; (2) the subject-matter of the disclaimer was not necessary for the carrying on of the company's business, which had come to an end; and (3) the right to disclaim property which had become a liability was exercisable personally by the liquidator without using the company's name, so that no question as to whether such disclaimer was ultra vires the company could arise.

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[1] Companies Act, 1948, s. 323: "(1) Where any part of the property "of a company which is being wound "up consists of land of any tenure "burdened with onerous covenants, of "shares or stock in companies, of "unprofitable contracts, or of any "other property that is unsaleable, or "not readily saleable, by reason of "its binding the possessor thereof to "the performance of any onerous act "or to the payment of any sum of "money, the liquidator of the company, notwithstanding that he has "endeavoured to sell or has taken "possession of the property or exercised any act of ownership in "relation thereto, may, with the leave "of the court and subject to the provisions of this section . . . disclaim the property: . . . (2) The "disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests and "liabilities of the company, and the "property of the company, in or in "respect of the property disclaimed, "but shall not, except so far as is "necessary for the purpose of releasing the company and the property "of the company from liability, affect "the rights or liabilities of any other "person."

In re Woking Urban District Council (Basingstoke Canal) Act, 1911 [1914] 1 Ch. 300; 30 T.L.R. 135 distinguished.

SUMMONS for leave to disclaim.

On May 19, 1836, the Nottingham General Cemetery Co. was incorporated by special Act of Parliament (6 Will. 4, c. xlv) for the purpose of establishing and maintaining a cemetery at Nottingham. Section 12 of the Act prohibited the company from selling or disposing of any of its land which had been consecrated, set apart, or used for the burial of the dead. The company's undertaking was successfully carried on for many years and profits were made by the company. By virtue, however, of sections 48 and 49 of the Nottingham Corporation Act, 1923 (13 & 14 Geo. 5, c. c), which provided, with certain exceptions, for the discontinuance of burials in the company's cemetery, the business of the company declined, and it sustained losses and eventually it became clear that the company could not continue. Accordingly, a petition for the compulsory winding up of the company as an unregistered company was presented under section 399 of the Companies Act, 1948, and an order on that petition was made on May 11, 1953. The Official Receiver was appointed liquidator.

According to the evidence the upkeep of the cemetery cost approximately £2,000 per annum. The liquidator had in hand £5,000, which was only sufficient to maintain the cemetery for two and a half years.

By this summons the liquidator applied for an order that he might be at liberty to disclaim (i) approximately 12 acres of freehold land constituting the company's cemetery in the city of Nottingham; (ii) the beneficial interest (if any) of the company in, and any implied contract to indemnify the trustees of approximately a further two and a half acres of freehold land used for the purpose of the cemetery together with the 12 acres; (iii) all implied covenants with the holders of grave certificates in respect of graves in the cemetery or the further two and a half acres; (iv) all contracts for the upkeep of graves in the cemetery or the said two and a half acres.

Raymond Walton for the Official Receiver and liquidator. This is an unregistered company, and accordingly, by virtue of section 399 of the Companies Act, 1948, all the provisions of Part V of the Act (winding up) apply to this company, subject to the limitations contained in the section. There are two courses open to the liquidator: (1) to disclaim the freehold cemetery and the contracts connected with it in order to wind up finally the affairs of the company; (2) under the directions of the court to carry on the business of the company for so long as the company's money, together with any calls which might be made under section 86 of the special Act, lasts. It would appear, however, that no further calls can now be made, for under that section the power to make calls is given to the directors, and it is settled law that directors cannot make calls after an order for winding up has been made: *Fowler* v. *Broad's Patent Night Light Co.*[2] Accordingly, the only power to make calls is that contained in section 260 of the Companies Act, 1948; see also section 401 of that Act.

The court on the previous summons has, in effect, determined that the date for ascertaining the liability of the members to contribute to the assets is the date of liquidation, but the maximum amount of any such liability is (a) the amount (if any) unpaid of the nominal amount of the shares held by a member, and (b) the amount (if any) unpaid in respect of any call made by the directors under section 86 of the special Act. On the evidence before the court the nominal amount was paid up on all the shares, and there is no evidence of any call made under section 86 of the special Act being in arrear. [Reference was also made to section 245 of the Companies Act, 1948.]

Of the two courses open to the liquidator disclaimer is to be preferred. Leave to disclaim is sought under section 323 of the Companies Act, 1948. The company's cemetery is land of freehold tenure "burdened with onerous covenants" within the meaning of the section, and its contracts are "unprofitable." The thousands of negative covenants affecting the user of the cemetery are onerous covenants: see the analogous position under the law of bankruptcy: *In re Mercer & Moore.*[3] The court plainly has jurisdiction to, and should, make an order under section 323 of the Companies Act, 1948.

W. F. Waite for the Commissioners of Crown Lands. In the event of the court acceding to the application, immediately upon disclaimer the cemetery will pass to the Crown, for there is no other person entitled to the freehold: see *per* Jessel M.R. in

[2] [1893] 1 Ch. 724.

[3] (1880) 14 Ch.D. 287, 292.

In re Mercer & Moore.[4] Notwithstanding, however, that the cemetery will thereupon vest in the Crown as bona vacantia, the Crown will not be in possession thereof until re-entry, and by virtue of the Queen's Remembrancer's Act, 1859 (22 & 23 Vict. c. 21), a right of re-entry accruing to the Crown may be exercised or enforced without any actual re-entry being made on the land. Nevertheless, until re-entry, the Crown has but seisin in law as distinct from seisin in deed.

It may be assumed that in the event of the application being granted, and there being subsequent disclaimer of the cemetery by the liquidator, the Crown will not re-enter. So long as the Crown does not re-enter the Crown is in law in the same position as an owner not in possession. But it is to be noted that the Public Health Act, 1936, does not bind the Crown.

Christopher Slade for a representative grave certificate holder. It is desired that the company should continue as a going concern. The liquidator's application is opposed on three grounds.

(1) The court has no jurisdiction to grant leave to disclaim because the application does not fall within the provisions of section 323 of the Companies Act, 1948. It is not disputed that freehold land is within the ambit of the section: *In re Mercer & Moore.*[5] But the cemetery is not burdened with onerous covenants. The section requires that the *land* be burdened with onerous covenants as distinct from the *owner* of the land. The onerous covenant here is the implied contract that the company will not use its land in a manner inconsistent with the rights of a grave certificate holder. That is not a covenant which touches and concerns the land and *burdens* the land, but merely binds the company personally. *In re Mercer & Moore*[5] is therefore plainly distinguishable.

(2) Where a company is incorporated to perform a public duty, with statutory rights and obligations, and holds land for those purposes, the court has no jurisdiction to give leave to the liquidator to sell or disclaim the land: *In re Woking Urban District Council (Basingstoke Canal) Act, 1911,*[6] in which it was held that the company had no power to assign its undertaking. That decision was reached despite the fact that the company was wound up under section 199 of the Companies Act, 1862, section 95 of which empowered a liquidator, inter alia, to sell the real and heritable property of a company. Moreover, the company's

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[4] 14 Ch.D. 287, 295.

[5] 14 Ch.D. 287.

[6] [1914] 1 Ch. 300, 307, 313.

special Act in that case contained no express prohibition against alienation, whereas section 12 of the Nottingham General Cemetery Company's special Act clearly contemplates that this company will continue indefinitely. This cemetery company was incorporated for a public purpose, and, therefore, the company cannot divest itself of its powers and duties without the liquidator first obtaining parliamentary sanction. [Reference was also made to *Birkdale District Electric Supply Co. Ld.* v. *Southport Corporation.*[7]]

(3) In considering the application the court is entitled to look not only at the interests of the shareholders of the company but also at the interests of third parties, and this would not be a suitable occasion for the court to exercise its discretion in favour of disclaimer. On the question of discretion, see *In re Katherine et Cie Ld.*[8]

Denys Buckley, for the Imperial War Graves Commission, adopted the argument for the grave certificate holders. The liquidator cannot be in a better position than the company. Accordingly, it is his duty to seek parliamentary sanction for the company to be dissolved. The Companies Act, 1948, which is a General Act cannot, without express provisions contained therein, abrogate the provisions of a special Act. It is plain that the company's special Act contemplated that the company should continue indefinitely: see section 12.

Christopher Shawcross Q.C. and *J. L. Elson Rees* for Nottingham Corporation, creditors of the company. The application of the liquidator should be refused. He can make calls under section 86 of the special Act for the purpose of carrying on the company's undertaking. The powers formerly exercisable by the directors are now vested in him. *Fowler* v. *Broad's Patent Night Light Co.*[9] is distinguishable, for the calls which the liquidator might make are not calls for payment of unpaid capital.

The application does not come within section 323 of the Act of 1948; the covenants affecting the cemetery are not "onerous" within the meaning of that section, for to be such they must be covenants which attach to and pass with the land.

If the court accedes to the application, immediately upon disclaimer the cemetery will vest in the Crown as bona vacantia, unless the Crown disclaims: see sections 354 and 355 of the

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[7] [1926] A.C. 355, 364.

[8] [1932] 1 Ch. 70, 77.

[9] [1893] 1 Ch. 724.

Companies Act, 1948. [Reference was also made to *In re Bradford Navigation Co.*[10] and *In re Suarez (No. 2).*[11]]

G. M. Parbury, for a representative shareholder, supported the application of the liquidator, referred to *Fowler* v. *Broad's Patent Night Light Co.*,[12] and submitted that the power to make calls under section 86 of the special Act had gone. He also referred to sections 260 and 273 of the Act of 1948.

Walton in reply. The covenants affecting the cemetery are plainly onerous: *Aldin* v. *Latimer Clark, Muirhead & Co.*[13] The *Woking* case[14] is distinguishable; it was there held that the company had no power to alienate its land. Therefore, any conveyance of the land was ultra vires the company and accordingly ultra vires the liquidator because upon any conveyance he was bound to affix the company's seal. But the right of disclaimer is *personal* to the liquidator. This right did not exist prior to 1929; it is given under section 323 of the Companies Act, 1948, and he can exercise it only in relation to property which has ceased to be an asset and become a liability. It arises for the first time when the company goes into liquidation and a liquidator is appointed. Accordingly, no question of ultra vires arises. [Reference was also made to *In re Crystal Palace Co.*[15]]

Cur. adv. vult.

May 18. WYNN-PARRY J., reading his judgment, stated the facts and continued: The liquidator's application is, however, opposed by the respondent the Nottingham Corporation, by the respondent Miss Clarke as representing all persons entitled to grave certificates issued by the company and all persons who have contracted with the company for the maintenance of graves in perpetuity, and by the Imperial War Graves Commission.

The Nottingham Corporation would be willing to withdraw their opposition provided that it were admitted on behalf of the Crown that the result of disclaimer by the liquidator would be that the freehold land vested in the Crown subject to the liabilities of the company in regard thereto. Mr. Waite, for the Commissioners of Crown Lands, intimated that while he was prepared to admit that upon disclaimer by the liquidator the land would vest in the Crown, he would contend that the Crown would

[10] (1870) L.R. 10 Eq. 331, 344.

[11] [1924] 2 Ch. 19, 23.

[12] [1893] 1 Ch. 724.

[13] [1894] 2 Ch. 437, 447.

[14] [1914] 1 Ch. 300.

[15] (1911) 104 L.T. 898; 27 T.L.R. 413.

only become involved in any liability if and when it entered into possession, a step which it was not intended should be taken. Mr. Shawcross invited me to resolve this dispute in dealing with this summons, but I propose to decline this invitation. If I were to accede to the liquidator's application, the question might well have to be debated between the Crown and the Nottingham Corporation, as the local authority within whose area the cemetery lies, but that question does not arise on this summons.

I propose to deal first with two submissions made by Mr. Slade on behalf of Miss Clarke and the class she represents, both of which go to the question of jurisdiction. His first submission was that the land in question could not be said to be "land . . . "burdened with onerous covenants" within the meaning of that phrase as used in section 323 of the Companies Act, 1948. For the purpose of considering this submission it is necessary to consider sections 37, 38 and 39 of the Special Act. Section 37, so far as material, reads as follows: "And be it further enacted, "That the conveyance of the exclusive right of burial or inter-"ment in all such vaults, catacombs, brick graves, graves, and "places of burial and of the right and privilege of erecting and "making of any family vaults, catacombs, brick graves, graves, "or places of burial, with the exclusive right of burial or inter-"ment therein, either in perpetuity or for a limited period, and "of the right and privilege of erecting of any monuments or "cenotaphs, shall be under the common seal of the said com-"pany, and shall and may be made in the words or to the effect "following, with such variations therein as the circumstances of "the case may render necessary (that is to say):

"The *Nottingham* General Cemetery Company By virtue of "an Act passed in the (blank) year of the reign of His Majesty "King William the Fourth, intituled (*here insert the title of this* "*Act*) We, the *Nottingham* General Cemetery Company, incor-"porated by and under the said Act, in consideration of the sum "of (blank) to us in hand paid by A.B., of blank), Do hereby "grant and convey unto the said A.B. the exclusive right of "burial and interment (*or, as the case may be*, the right and "privilege of erecting and making, and the exclusive right of "burial and interment when made) in all (*here describe the vault,* "*catacomb, or place of burial, or the ground intended for the* "*construction of a vault, catacomb, or place of burial, or for the* "*erection of a monument or cenotaph, as the case may be, so as* "*to identify the same*), To hold the same to the said A.B. in

" perpetuity (*or for the period agreed upon*) for the purpose of " burial (*or as the case may be*), subject to such rules, orders, " and regulations, as have been or shall from time to time here- " after be made by the said company, for the management and " regulation of the said cemetery and the catacombs or vaults " therein. Given under our common seal," and then there is provided a place for insertion of the date. The section continues: " And every such conveyance so made shall be good, valid and " effectual, both at law and in equity, without words of " inheritance, limitation, or representation, to vest the exclusive " right of burial or interment in the catacomb or vault described " therein, or to be erected or made in pursuance thereof, in the " person purchasing the same, and his personal representatives, " legatees, and assigns, in perpetuity or for the period agreed " upon, without any faculty whatever, subject to the payment " of such fees as may be by the rules and regulations of the said " company from time to time payable, on the interment of any " corpse in such vault or cemetery, and subject also to such rules, " orders, and regulations, as shall from time to time be made by " the said company for the better regulation of the said cemetery " and the vaults and catacombs thereof; and an entry or memorial " of every such grant or assignment, containing the date thereof " and the names of the parties, with their proper additions, to " whom the same shall have been made, with a sufficient description of the vault or catacomb, or of the piece of ground for the " erection of a vault or catacomb comprised thereon, so as to " identify the same, and the amount of the sum paid for the " purchase thereof, shall within twenty-eight days after the date " thereof, be entered in some book to be kept by the clerk of the " company. . . ."

Section 38, in so far as material, reads as follows: " And be it " further enacted, That the exclusive right of burial or interment " in any vault, catacomb, and burial-place, which shall be so " purchased as aforesaid, and, after such purchase, shall have " been conveyed to the purchaser thereof, in the manner herein " before directed, shall, if in perpetuity, be considered as a " personal inheritance, and shall and may, whether granted in " perpetuity or for a limited period, be sold and disposed of and " assigned in his lifetime, or bequeathed by his last will and " testament; and every such assignment or disposition, except by " will, may be made in the form or to the effect, following (that " is to say)," and then there follows a form of assignment which

I need not read. Then the section proceeds as follows: "And "every such assignment, if made in the form or to the effect "aforesaid, shall be valid and effectual in the law, without "enrolment and without words of inheritance, limitation, or "representation, to vest the exclusive right of burial or interment "in the said vault or catacomb in the purchaser thereof, his "personal representatives, legatees, and assigns, either in "perpetuity or for the remainder of the period for which the "same was originally granted, free from all claims whatever by "or from the person making or executing the same, or any person "claiming through, under, or in trust for him."

By section 39 it is provided that derivative assignments are to be registered.

Mr. Slade contends that there is to be discovered no more than an implied obligation on the company not to derogate from its own grant by using the land inconsistently with the grant; but, he argues, such an obligation does not touch or concern the land; it is the company which is burdened, not the land: and therefore the land is not burdened with onerous covenants within the meaning of section 323 of the Companies Act, 1948.

Against this it was argued by Mr. Walton and Mr. Parbury that the restrictions are not personal but bind or touch and concern the land. The form of grant confers an exclusive right to burial in a specified part of the cemetery, a right which is evidenced by registration in the book kept for the purpose. It therefore necessarily follows that the land cannot be used for any purpose conflicting with that right. To adopt Mr. Parbury's test, let it be visualized that the land is sold. In such an event the purchaser must take with notice of the restrictions: and I cannot see that there would be any defence to an action for specific performance by the grantee against the purchaser. Nor is it any objection that the company's obligations are negative in character: *In re Mercer & Moore.*[1] I therefore hold that the land the subject of this summons is land burdened with onerous covenants within the meaning of section 323 of the Companies Act, 1948.

The second submission by Mr. Slade on the matter of jurisdiction can be put shortly thus: the special Act incorporating the company implies the positive obligation on it to continue to carry on its undertaking indefinitely and the further obligation not to alienate that undertaking and therefore not to alienate its land without which the undertaking could not be carried on: it therefore follows that the company could alienate its land only under the authority of a further special Act of Parliament: the act of disclaimer involves alienation; and therefore there is no jurisdiction in the court to authorize this to be done.

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[1] (1880) 14 Ch.D. 287.

For this proposition Mr. Slade relied on *In re Woking Urban District Council (Basingstoke Canal) Act, 1911.*[2] The facts in that case were: "In 1777 an Act of Parliament was "passed for making a canal. It incorporated a company by name "of the Company of Proprietors of the Basingstoke Canal Navi-"gation, authorized them to construct the canal, to make by-"laws, demand tolls, and acquire land. All persons were to have "the right to use the canal on payment of tolls. The company "were to make and maintain bridges. Throughout the Act in "conferring rights or imposing obligations on the company the "words 'their successors and assigns' were added.

"The canal was made and navigation carried on till 1866, "when a winding-up order was made. In 1874 the liquidator "with the sanction of the judge sold the canal to S. A. The word "'undertaking' was not used in the conveyance, but possession "was taken, and tolls levied and received. In 1878 the company "was dissolved by an order of the court. S. A. sold various "portions of the land, and the last purchaser of the canal and "undertaking was the L. and S. W. Canal, Limited, which "executed a mortgage thereof to W. Carter.

"The canal bridges fell into disrepair, and the Woking Urban "District Council obtained an Act of Parliament in 1911 which "authorized them to do the repairs and recover the costs from "'the company.'"

The Court of Appeal held as part of their decision that the company had no power to assign their undertaking and that nothing passed to Mr. St. Aubyn [S. A.] by the conveyance of 1874. The Master of the Rolls, having reviewed two earlier authorities, said[3]: "I think nothing passed by the conveyance, "for it purported to pass that without which this statutory under-"taking could not be carried on, and was, therefore, ultra vires "the company. In saying this, I do not refer to any surplus "lands, or to property which might be parted with without "damage to the undertaking. The proper course for the liquidator "to have taken was to have applied for a private Act of "Parliament authorizing the transfer of the undertaking to the

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[2] [1914] 1 Ch. 300; 30 T.L.R. 135.

[3] [1914] 1 Ch. 300, 309.

"purchaser. This course has actually been followed in several "cases. In my opinion the purchaser acquired only a possessory title which might ripen into a fee simple by virtue "of the Statute of Limitations." Swinfen Eady L.J. said[4]: "Where a company is incorporated by statute for a public pur- "pose, with compulsory powers of acquiring land and other "statutory privileges, and with statutory obligations, it cannot, "without the intervention and authority of Parliament, transfer "its undertaking, or its powers or privileges, to other persons. "Neither can it mortgage its undertaking, except in the manner "and to the extent permitted by Parliament. It has generally "been with reference to railway companies that questions of "this nature have arisen; but the rule is not limited to these "companies; it extends also to water companies, canal com- "panies, and the like."

Finally, Phillimore L.J. in his judgment said[5]: "The canal "fell, as many other canals have fallen, on evil days; and in "1866 an order was made to wind it up. Such an order could, "according to the decisions, be made under the provisions of "section 199 of the Companies Act, 1862; and similar orders have "been made in other cases. Under such an order there would be "an official liquidator who would have power to use the rents "and profits to pay debts, and who might sell any real or "personal property not required for the purpose of the under- "taking. He had, however, in my opinion, no power to proceed "further and sell the canal with its locks and tow-paths, or any "other property real or personal required for the use of the "undertaking. James L.J., it is true, in *In re Bradford Naviga- "tion Co.*,[6] seems to have thought that a liquidator could so sell; "but it was an obiter dictum, and he said that the liquidator "could not, by selling, free the lands from their liability to "discharge the public uses and burdens of the undertaking; and "he intimated that in all probability recourse would have to be "had to an Act of Parliament—a recourse which was, in fact, "had in the case of the Wey and Arun Canal Co. Unless and "until the property of a corporation or company in course of "liquidation is sold, the corporation or company ought not to "be finally wound up and dissolved. In fact, however, the "liquidator purported to sell the land, not the undertaking, to

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[4] [1914] 1 Ch. 300, 313.

[5] Ibid. 317.

[6] (1870) L.R. 5 Ch. 603.

"one St. Aubyn in 1874; and the company was dissolved by "order of the court in 1878."

On the authority of that case Mr. Slade contends that as disclaimer will involve an alienation of the company's land I have no jurisdiction to allow such disclaimer. That case is clearly authority for the proposition that a company incorporated by special Act of Parliament to establish and maintain an undertaking for some public purpose (and I do not doubt that the company falls within that class), has no power to dispose of that undertaking, or of any land necessary for its carrying on, and that, although there is jurisdiction in the court to order such a company to be wound up under the Companies Act, 1948, as an unregistered company, the fact of liquidation does not put the liquidator in a better position than that in which the company was prior thereto so that he can do what was ultra vires the company. Just as such a company, during its active existence, would have had to seek the authority of Parliament to sell its undertaking, so its liquidator must seek such authority on its behalf.

In this regard it is material to remember, as Mr. Walton pointed out, that upon a liquidation nothing vests in the liquidator, and if he designs to convey the company's land to a purchaser he must convey in the name of the company and affix its seal to the conveyance. It is also, I think, material to point out that the rule underlying *In re Woking Urban District Council (Basingstoke Canal) Act, 1911,*[7] is somewhat special in that it cuts down by implication the effect of the apparently unqualified words of section 404 of the Companies Act, 1948, and the corresponding sections in the earlier Companies Act. The case, however, clearly binds me, and I must apply it, if I conclude that it is applicable in the present case. I take the view, however, that that case has no application to the case before me. The act which was considered by the Court of Appeal was the act of selling land without which the undertaking could not be carried on; an act which was ultra vires the company. In the present case the act for which authority is sought is the disposal of land because the undertaking has by force of circumstances come to an end, or is about to come to an end. There can be no reason for retaining land which was used for the purpose of carrying on the undertaking when the undertaking has come to an end. Further, unlike the case of a sale, the liquidator in making a disclaimer does not have to use the name of the company. The right to disclaim is a right conferred on the liquidator, as such, by section 323 of the Companies Act, 1948—a right which did not exist prior to 1929. He exercises it by writing under his hand, and he can exercise it only in relation to property which in effect has ceased to be an asset and has become a liability. In those circumstances no question of ultra vires arises: the right is one which ex natura the company could not enjoy; it arises for the first time when the company goes into liquidation and a liquidator is appointed. In my judgment Mr. Slade's second objection fails. I therefore hold that I have jurisdiction to make the order asked for.

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[7] [1914] 1 Ch. 300.

The question then arises: Ought I to exercise my discretion under the section in favour of the liquidator? Prima facie I think that I should do so. If I make the order as asked, the liquidation will proceed in an orderly manner to its close. Upon disclaimer, claims will no doubt be advanced by those injured by the disclaimer. In that case the funds in the hands of the liquidator, subject to provision for the costs of the liquidation, will be available to meet those claims pro tanto. On the other hand, if I refuse the order, the result must be that the liquidator will have to be given leave to continue to maintain the cemetery for the next two and a half years, at the end of which time the funds will be exhausted and dissolution must supervene.

Mr. Slade, on behalf of the class which he represents, urged me to refuse to make the order asked for, in order that the cemetery should be carried on for this limited period, saying that those whom he represented would prefer that course even if it meant exhausting the funds in the hands of the liquidator. I do not favour that course. It cannot lead to anything constructive, and it must involve dissipation of the only fund which ought to be available for those who, whether I make the order asked for or not, are bound to suffer.

Then I was urged by Mr. Shawcross to refuse the order, so that the liquidator might be put in a position to carry on for some longer period than the two and a half years to which I have referred; he did not specify the period. His plea was based on the submission that the liquidator could make calls under section 86 of the special Act in the liquidation for the purpose of carrying on the undertaking. In dealing with the previous summons in this matter, which raised the question whether the liability of the members was limited or unlimited, I held as a

1955

THE NOTTINGHAM GENERAL CEMETERY CO., *In re.*

Wynn-Parry J.

matter of construction that section 86 was not merely ancillary to section 85, and that under section 86 the directors had power from time to time to make calls on the proprietors in addition to the calls which they were directed to make in respect of the £10 per share by section 85. The power to make calls under section 86 is confined to the directors, and the object of the calls is to defray the expenses of or to carry on the undertaking. The effect of the winding-up order was, in my view, to bring to an end the power of the directors to make calls, and thereafter the only power is the statutory power contained in section 260 of the Companies Act, 1948: see *Fowler* v. *Broad's Patent Night Light Co.*[8] The scope of that statutory power is to "make "calls on all or any of the contributories . . . to the extent of "their liability," and the object of making such calls is limited by the words "for payment of any money which the court "considers necessary to satisfy the debts and liabilities of "the company, and the costs, charges and expenses of "winding up, and for the adjustment of the rights of the "contributories among themselves." Section 401 of the Companies Act, 1948, is designed to fit unregistered companies into this scheme: subsection (1) reads as follows: "In the event of "an unregistered company being wound up, every person shall "be deemed to be a contributory who is liable to pay or contribute "to the payment of any debt or liability of the company, or to "pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves, or to "pay or contribute to the payment of the costs and expenses "of winding up the company, and every contributory shall be "liable to contribute to the assets of the company all sums due "from him in respect of any such liability as aforesaid:".

Having regard to my decision on the previous summons the date for ascertaining the liability of the members to contribute to the assets, is the date of liquidation, and the maximum amount of such liability in the case of any member is (1) the amount (if any) unpaid of the nominal amount (£10) of the shares held by him, and (2) the amount (if any) unpaid in respect of any call made by the directors under section 86 of the special Act. The evidence shows that the nominal amount (£10) was paid up on all the shares, and there is no evidence of any call made under section 86 of the special Act being in arrear. A further objection to Mr. Shawcross's suggestion is that under section

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[8] [1893] 1 Ch. 724.

245 (1) of the Companies Act, 1948, the power to carry on business is limited by the words " . . . so far as may be neces-"sary for the beneficial winding up thereof."

It was further argued that in deciding whether or not to exercise my discretion I ought to take into account the effect which it would have on the interested parties, and that it would have such an adverse effect that I should refuse the order. In support of this submission the case of *In re Katherine et cie Ld.*[9] was cited. Undoubtedly the court can and should consider the rights of parties interested, but that case was a very different case from the present, and affords me no assistance in resolving the problem before me. The headnote in that case, so far as material, reads as follows: " Where the liquidator of a company " applies for leave to disclaim leasehold property of the company, " the court, in exercising its discretion, may take into considera-" tion the effect of the disclaimer on interested parties. The " liquidator of a company holding a lease applied for liberty to " disclaim the lease. The lessors, who were relying on certain " guarantors for the payment of the rent and performance of the " covenants, opposed the application, on which the registrar " made no order save as to payment of costs. On a motion " before the court by way of appeal:—*Held*, that, as the lessors, " who were entitled to appear, would suffer substantial injury " if the disclaimer were allowed, the court, in the exercise of its " discretion, would not allow it."

In the course of his judgment Maugham J. stated that the refusal of the court to allow the disclaimer would not prejudice the liquidator in winding up the affairs of the company, and concluding the liquidation in due course. In the present case, to refuse to allow the disclaimer would clearly hamper the course of the liquidation, without giving any corresponding benefit to those who oppose it, regarding them as creditors; the only capacity in which I can regard them.

Further, I was pressed to refuse the relief asked for with a view to the liquidator presenting a Bill to Parliament for a further special Act. It was not suggested what the contents of the Bill might be. The short answer to this suggestion is, to my mind, that the function of the liquidator is to administer the affairs of the company with a view to concluding the liquidation in due course. To do this it does not require an Act of Parliament. Further, he does not want to promote any such Bill, and I know of no jurisdiction by which in such circumstances the court could compel him to do so. It appears to me that if any Bill is to be promoted with a view to providing for the future maintenance of this cemetery, it must be promoted outside the liquidation by those whose interest or duty it may be to see that the cemetery is maintained. For those reasons I propose to make the order as asked.

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[9] [1932] 1 Ch. 70.

Order accordingly.

Solicitors: *Slaughter & May; Lee, Ockerby, Johnson & Co.; Sharpe, Pritchard & Co. for T. J. Owen, Town Clerk, Nottingham; Legal Adviser to the Imperial War Graves Commission; A. R. Astley Weston, Solicitor to Commissioners of Crown Lands; Theodore Goddard & Co.*

J. A. G.

1955
Mar. 10.

Danckwerts J.

In re MARTIN, DECD.
MIDLAND BANK EXECUTOR AND TRUSTEE CO. LD. *v.* MARFLEET AND OTHERS.

[1954 M. 180.]

Administration of Estates — Order of application of assets — Will — Legacies—Solvent estate—Real estate undisposed of—Debts and funeral and testamentary expenses directed to be paid out of residuary personal estate—Administration of Estates Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 23), *ss.* 33 (1), (2), (7), 34 (1), (3), *Sch.* 1, *Part II, paras.* 1, 2.

By his will made in 1938 a testator bequeathed pecuniary legacies and devised all his real estate to one of his daughters absolutely. He further bequeathed by clause 2 (3) the residue of his personal estate to his trustees on trust to sell and convert it into money and out of the moneys to arise therefrom and with and out of his ready money to pay his just debts, funeral and testamentary expenses and to stand possessed of the residue as therein directed. By a codicil made in 1944 the testator revoked the devise of his real estate of which he did not make any other disposition. In 1953 he died, his estate being solvent. On a summons to decide out of which of his properties his debts, funeral and testamentary expenses and the legacies ought to be paid:—

Held, (1) that clause 2 (3), which cast the just debts, funeral and testamentary expenses on the personal estate, varied the provisions of the Administration of Estates Act, 1925, and made the personal estate the primary fund to meet those obligations.

In re Atkinson [1930] 1 Ch. 47 applied.

(2) That the proper fund to meet the legacies was the real estate, in accordance with paragraph 1 of Part II of Schedule 1 to the Act.

In re Thompson [1936] Ch. 676; [1936] 2 All E.R. 141 considered.

1955

MARTIN, DECD., *In re.* MIDLAND BANK EXECUTOR AND TRUSTEE CO. LD. *v.* MARFLEET.

ADJOURNED SUMMONS.

By his will dated December 13, 1938, George Thomas Barnes Martin (hereinafter called " the testator ") appointed the plaintiff company (hereinafter called " the trustee ") executor and trustee of his will should his wife predecease him (which happened) and, after bequeathing two legacies, provided by clause 2: " (2) I " devise all my real estate . . . unto my daughter Kathleen " Hulett absolutely. (3) I give and bequeath all the rest, " residue and remainder of my personal estate . . . upon trust " that [the trustee] shall sell call in and convert into money " the same or such part thereof as shall not consist of money . . . " and with and out of the moneys to arise from such sale calling in " and conversion and with and out of my ready money pay my " just debts and funeral and testamentary expenses and shall " stand possessed of the proceeds of such sale calling in and " conversion (hereinafter called 'my residuary estate') " as therein mentioned. By a first codicil dated March 17, 1944, the testator revoked clause 2 (2) of the will, i.e., revoked the devise to his daughter. By a second codicil dated March 26, 1947, he made other provisions for her, and in all other respects confirmed his will and first codicil. He made no other disposition of his real estate, which, accordingly, was undisposed of, and with regard to which there was an intestacy. On February 25, 1953, he died and, on January 15, 1954, the trustee took out a summons to which the first defendant was a daughter of the testator interested on intestacy and also under the will, and the second and third defendants were grand-daughters interested under the will.

By this summons the trustee asked, inter alia, whether, on the true construction of the will and codicils, all or any and if so which of (a) the testator's debts and funeral and testamentary expenses, (b) the administration expenses (if any) other than testamentary expenses incurred in connexion with his estate, (c) the pecuniary legacies bequeathed by his will and codicils should be paid or satisfied out of (i) the testator's property undisposed of by his will and codicils, or (ii) his personal estate included in the residuary gift of personalty contained in his will,

1955

MARTIN, DECD., *In re.* MIDLAND BANK EXECUTOR AND TRUSTEE CO. LD. *v.* MARFLEET.

or how otherwise the said expenses and legacies respectively should be paid and satisfied.

At the hearing the court considered the relevant provisions of the Administration of Estates Act, 1925.[1]

Robert S. Lazarus for the trustee.

J. A. Wolfe for the daughter. The debts, funeral and testamentary expenses and legacies should be paid out of the residuary personal estate in exoneration of the real estate as to which there is an intestacy. Having regard to the provision in section 34 (3) of the Administration of Estates Act, 1925, with reference to the discharge of the "funeral, testamentary and administration "expenses" and to the words of the will throwing "funeral and "testamentary expenses" on to the residuary estate, the distinction can be drawn between "funeral and testamentary expenses" and "administration expenses."

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[1] Administration of Estates Act, 1925, s. 33 (1): "On the death of a "person intestate as to any real or "personal estate, such estate shall be "held by his personal representatives "—(*a*) as to the real estate upon "trust to sell the same; and (*b*) as "to the personal estate upon trust to "call in sell and convert into money "such part thereof as may not con-"sist of money . . .

"(2) Out of the net money to arise "from the sale and conversion of "such real and personal estate (after "payment of costs), and out of the "ready money of the deceased (so "far as not disposed of by his will, "if any), the personal representatives "shall pay all such funeral, testa-"mentary and administration ex-"penses, debts and other liabilities "as are properly payable thereout "having regard to the rules of ad-"ministration contained in this Part "of this Act, and out of the residue "of the said money the personal "representative shall set aside a fund "sufficient to provide for any "pecuniary legacies bequeathed by "the will (if any) of the deceased.

"(7) Where the deceased leaves a "will, this section has effect subject "to the provisions contained in the "will."

S. 34 (1): "Where the estate of "a deceased person is insolvent, his "real and personal estate shall be "administered in accordance with the "rules set out in Part I of the First "Schedule to this Act . . .

"(3) Where the estate of a de-"ceased person is solvent his real "and personal estate shall, subject to "rules of court and the provisions "hereinafter contained as to charges "on property of the deceased, and "to the provisions, if any, contained "in his will, be applicable towards "the discharge of the funeral, testa-"mentary and administration ex-"penses, debts and liabilities payable "thereout in the order mentioned in "Part II of the First Schedule to "this Act."

Schedule I, Part II: "Order of "application of assets where the "estate is solvent. 1. Property of "the deceased undisposed of by will, "subject to the retention thereout of "a fund sufficient to meet any "pecuniary legacies. 2. Property of "the deceased not specifically devised "or bequeathed but included (either "by a specific or general description) "in a residuary gift, subject to the "retention out of such property of a "fund sufficient to meet any pecuni-"ary legacies, so far as not provided "for as aforesaid."

The matter is covered by authority. Clause 2 (3) of the will has thrown the debts on to the residuary personal estate and has altered the order of the application of assets: *In re Petty*[2]; *In re Atkinson*[3]; *In re Kempthorne*[4]; and, with regard to debts, *In re Harland-Peck.*[5] Thus, debts and funeral and testamentary expenses are payable out of the residuary personal estate in exoneration of the real estate; so are the legacies: *In re Beaumont's Will Trusts.*[6] [*In re Lamb*[7] was also referred to.] In *In re Worthington*[8] there was a clear gift of the residuary estate and the Court of Appeal held that the legacies were payable out of a lapsed share of the residuary estate. The court is here concerned with a statutory power, and in the Administration of Estates Act, 1925, there is not any statutory power bringing together legacies and debts. *In re Worthington*[9] is an unsatisfactory decision in which the court relied on *In re Tong*[10] and *In re Kempthorne*[11] as bringing together legacies and debts, whereas in each of those cases it was not the court, but the testator, who did so. The decision in *In re Worthington*[12] must, it is submitted, be treated as having been arrived at inadvertently. [Reference was made to *In re Thompson,*[13] *In re Rowe,*[14] *In re Anstead*[15] and *In re Ridley.*[16]] There is not in the Administration of Estates Act, 1925, any direction for the payment of legacies. Parliament has, in section 33 (2), directed the setting aside of a fund, but has not directed the application of that fund. *In re Tong*[17] is not an authority on which the Court of Appeal could rely with regard to debts, although they clearly did so.

J. A. Armstrong for the grand-daughters. Prima facie the case falls within section 33 of the Administration of Estates Act, 1925. The testator did die intestate as to part of his real estate, so that subsection (1) applies. The direction in subsection (2) that "the personal representative shall set aside a fund sufficient "to provide for any pecuniary legacies bequeathed by the will . " must be a direction to pay the legacies; and *In re Worthington*[18] is a binding decision to that effect. [*In re McKee* [19] and *In re Gillett's Will Trusts* [20] were also referred to.]

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[2] [1929] 1 Ch. 726.

[3] [1930] 1 Ch. 47.

[4] [1930] 1 Ch. 268; 46 T.L.R. 15.

[5] [1941] Ch. 182; 57 T.L.R. 118; [1940] 4 All E.R. 347.

[6] [1950] Ch. 462; 66 T.L.R. (Pt. 1) 712; [1950] 1 All E.R. 802.

[7] [1929] 1 Ch. 722; 45 T.L.R. 190.

[8] [1933] Ch. 771; 49 T.L.R. 444.

[9] Ibid.

[10] [1931] 1 Ch. 202.

[11] [1930] 1 Ch. 268; 46 T.L.R. 15.

[12] [1933] Ch. 771; 49 T.L.R. 444.

[13] [1936] Ch. 676; [1936] 2 All E.R. 141.

[14] [1941] Ch. 343; 57 T.L.R. 592; [1941] 2 All E.R. 330.

[15] [1943] Ch. 161; 59 T.L.R. 219; [1943] 1 All E.R. 522.

[16] [1950] Ch. 415; 66 T.L.R. (Pt. 1) 981; [1950] 2 All E.R. 1.

[17] [1931] 1 Ch. 202.

[18] [1933] Ch. 771; 49 T.L.R. 444.

DANCKWERTS J. This case raises a point of some interest, but, so far as I can see, though there are numerous cases on the subject, there is no decision covering the point.

[His Lordship stated the facts, and continued:] There is no other disposition of the real estate which, accordingly, is undisposed of, so that there is an intestacy with regard to it. It therefore becomes necessary to look at the Administration of Estates Act, 1925, to see what is to happen.

Section 33 provides: "(1) On the death of a person intestate "as to any real or personal estate, such estate shall be held by "his personal representatives—(*a*) as to the real estate upon trust "to sell the same; and (*b*) as to the personal estate upon trust to "call in sell and convert into money such part thereof as may "not consist of money . . . (2) Out of the net money to arise "from the sale and conversion of such real and personal estate "(after payment of costs), and out of the ready money of the "deceased (so far as not disposed of by his will, if any), the "personal representatives shall pay all such funeral, testamentary "and administration expenses, debts and other liabilities as are "properly payable thereout having regard to the rules of administration contained in this Part of this Act, and out of the residue "of the said money the personal representative shall set aside a "fund sufficient to provide for any pecuniary legacies bequeathed "by the will (if any) of the deceased." I pause there to observe that Mr. Armstrong has called to my attention the fact that section 33 (1) and (2) applies to any real or personal estate in respect of which the deceased is intestate. Prima facie, therefore, any parts of the estate, whatever their particular nature may be, in respect of which there is no effective disposition by the deceased, are subject to these two subsections. In other words, it is true to say that the undisposed-of real estate is subject to them.

The only other subsection with which I need deal is subsection (7), which provides: "Where the deceased leaves a will, this "section has effect subject to the provisions contained in the "will." Section 34 provides: "(1) Where the estate of a "deceased person is insolvent, his real and personal estate shall

[19] [1931] 2 Ch. 145; 47 T.L.R. 424.

[20] [1950] Ch. 102; 65 T.L.R. 727; [1949] 2 All E.R. 893.

"be administered in accordance with the rules set out in Part I "of the First Schedule to this Act. . . . (3) Where the estate "of a deceased person is solvent his real and personal estate shall, "subject to rules of court and the provisions hereinafter contained "as to charges on property of the deceased, and to the provisions, "if any, contained in his will, be applicable towards the discharge "of the funeral, testamentary and administration expenses, debts "and liabilities payable thereout in the order mentioned in Part II "of the First Schedule to this Act." It is to be observed that whereas in section 33 (2) there is a reference to the setting aside of a fund for pecuniary legacies, section 34 (3) refers only to the discharge of the funeral, testamentary and administration expenses, debts, liabilities, and does not refer to legacies at all.

I now turn to Schedule I, and as the estate is solvent the relevant Part is Part II, which sets out the order of the application of the assets of the estate. I must refer also to paragraph 2, though it is not a paragraph which applies in the present circumstances. These provisions read as follows: Schedule I, Part II: "Order of application of assets where the estate is "solvent. 1. Property of the deceased undisposed of by will, "subject to the retention thereout of a fund sufficient to meet "any pecuniary legacies. 2. Property of the deceased not "specifically devised or bequeathed but included (either by a "specific or general description) in a residuary gift, subject to "the retention out of such property of a fund sufficient to meet "any pecuniary legacies, so far as not provided for as aforesaid." "As aforesaid" in paragraph 2 I take to be a reference to the preceding paragraph 1.

First, one thing is plain, namely, that the provision in clause 2 (3) of this will is a direction varying the provisions of the Administration of Estates Act in so far as it applies. It is a bequest of the personal estate only, and it casts on the personal estate the just debts, funeral and testamentary expenses. To that extent, therefore, the will, by this direction, has made the personal estate the primary fund to meet those obligations.

In support of that view I must refer to *In re Atkinson.*[1] The circumstances in that case were similar to those in the present except that in that case the question of the fund for the payment of legacies was not raised. The question remains whether the legacies are to be paid primarily out of the undisposed-of real estate or whether, as, indeed, was the old law in operation before the Administration of Estates Act, 1925, came into force, the legacies are charged primarily upon the personal estate.

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[1] [1930] 1 Ch. 47.

I have been very properly referred to a large number of cases by counsel in this case, to whose arguments I am very much indebted, but there is no case, as I have said, except *In re Atkinson*,[2] so far as it goes, which really applies, in my opinion, to the present case. This is a case which I have to consider to some extent without much guidance. I do not propose to go through all the cases, though I have considered them carefully in the course of counsel's argument, but they are all distinguishable in some respect or other, except as I shall mention presently.

In re Thompson,[3] a decision of Clauson J., was not quite the same as the present, because there the testator, after bequeathing an annuity and certain legacies, devised and bequeathed all his real and personal estate not otherwise devised or bequeathed to certain persons, and he left personal estate, and real estate of considerably greater value. In that case there was no question of intestacy, but there was merely a common fund comprised of the real and personal estate; and the question was, as there was no direction in the will how the legacies were to be borne, whether the Administration of Estates Act, 1925, threw the burden of the legacies rateably on the real property and the personal property, or whether the old law applied, which made the personal estate the primary fund to meet the legacies. Clauson J. held that the law in force before the Administration of Estates Act, 1925, with regard to the primary fund for payment of legacies as between the personal and real estate, had not been altered by section 34 (3), and paragraphs 2 and 8 (*b*) of Part II of Schedule I to that Act, and that the personal estate must be treated as primarily liable, and recourse would not be made to the real estate until the personal estate had been exhausted; and he followed *In re Boards*,[4] which was decided before the Act came into force. I will refer to the judgment of Clauson J. to see what view he took of paragraph 2 of Part II of Schedule I to the Act. He read paragraph 2 and went on to say [5]: "The last words mean, so far as not provided for out of the part "of the estate as to which the testator died intestate. It is "suggested that the effect of that provision is to alter the law, "and to provide that the fund which is to be retained out of "residuary realty and personalty in order to meet pecuniary

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[2] [1930] 1 Ch. 47.

[3] [1936] Ch. 676; [1936] 2 All E.R. 141.

[4] [1895] 1 Ch. 499.

[5] [1936] Ch. 676, 682.

"legacies is to be retained in the following way: that a propor-"tionate part is to be retained out of realty and personalty "pro rata of the amount of the realty and personalty respectively. "The provision does not say so, and the provision is not con-"cerned with any such matter. The provision is concerned with "the way in which funeral testamentary and administration "expenses, debts and liabilities are to be met. There is no "indication there that there is any intention of altering the law "in respect of the rights of the legatees as against those "interested in the residuary personalty and residuary real estate, "or in respect of the rights inter se of those interested in the "residuary realty and personalty respectively, as regards bearing "the charge of legacies, and I can see no foundation for the "suggestion that that provision has in any way altered the law "as laid down in *In re Boards*."[6]

There Clauson J. was dealing with paragraph 2, which directed the retention of funds for legacies out of a mixed fund, and he decided that there was nothing in the paragraph which made the personalty or realty primarily bear the burden in respect of that obligation, and therefore the old law applied, and he applied it accordingly. That paragraph is not one which applies in the present case; it is paragraph 1 which applies.

I mention in passing that I followed that case in *In re Beaumont's Will Trusts*,[7] which was very different from the present case, because there was in that case a trust for sale, and there was not, as in the present case, an intestacy with regard to a particular asset of the testator's estate, but merely an intestacy with regard to a share of the fund given in the will, and therefore, as it seems to me, *In re Beaumont's Will Trusts*[8] has no application to the case which I have to decide now. There are no other cases which give me any real assistance at all.

What is the result, therefore, of the provision contained in paragraph 1 of Part II of Schedule I to the Administration of Estates Act, 1925? That paragraph, just as in the case of section 33 (2), directs that the undisposed-of property of the deceased is to be the fund for the debts, and so on, subject to the retention thereout of the fund sufficient to meet any pecuniary legacies. It has been argued that that merely requires the setting aside of a fund, and contains no provision for the payment of the legacies out of that fund. *In re Thompson*[9] was

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[6] [1895] 1 Ch. 499.

[7] [1950] Ch. 462; 66 T.L.R. (Pt. 1) 712; [1950] 1 All E.R. 802.

[8] Ibid.

[9] [1936] Ch. 676.

1955

MARTIN, DECD., *In re.* MIDLAND BANK EXECUTOR AND TRUSTEE CO. LD. *v.* MARFLEET.

Danckwerts J.

called in aid to that extent to show that a mere direction to set aside did not settle the matter of payment, but I am unable to see what is the object of setting aside a fund unless that fund is to be used for the payment of the legacies for which it is to provide. In paragraph 2, of course, the fund was to be set aside, and, indeed, there was no real dispute in *In re Thompson* [10] that that fund was the fund which was to meet the legacies. The point in *In re Thompson* [10] was whether the fund for that purpose had to be taken wholly out of the personal estate, or had to be taken rateably out of the real and personal estate of the deceased.

It seems to me that here I am dealing simply with one asset, the undisposed-of real estate, and out of that undisposed-of real estate a fund is to be raised to provide for the pecuniary legacies, and if the fund is not to be raised for the payment of the pecuniary legacies, it is difficult to see what reason there is for setting aside the fund. Therefore I am necessarily driven to the conclusion that the proper fund to meet the legacies in the present case is the undisposed-of property according to paragraph 1 of Part II of Schedule I to the Act. The testator's debts and funeral and testamentary expenses will be borne by the residuary personal estate, and the legacies by the property undisposed of by the will and codicils.

Order accordingly.

Solicitors: *Gardiner & Co. for D'Angibau & Malim, Bournemouth; Edwin Coe & Calder Woods for Other, Manning & Co., Bournemouth; Alfred Blundell.*

K. R. A. H.

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[10] [1936] Ch. 676.

END OF VOLUME AND OF CHANCERY SERIES FOR 1955.

The Mode of Citation of the Volumes of the *Law Reports* for 1955, is as follows:—

[1955] Ch.   [1955] P.
[1955] 1 Q.B.   [1955] 2 Q.B.
[1955] A.C.

INDEX

ADMINISTRATION OF ESTATES—*Order of application of assets—Will—Legacies—Solvent estate—Real estate undisposed of—Debts and funeral and testamentary expenses directed to be paid out of residuary personal estate—Administration of Estates Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 23), *ss.* 33 (1), (2), (7), 34 (1), (3), *Sch.* 1, *Part II*, *paras.* 1, 2.
In re Martin, decd. Midland Bank Executor and Trustee Co. Ld. *v.* Marfleet **Danckwerts J. 698**

2. —— *Personal chattels — Racehorses — Used for recreational purposes—Administration of Estates Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 23), *ss.* 46, 55 (1) (x).
In re Hutchinson, decd. Holt *v.* Hutchinson - - - - **Danckwerts J. 255**

3. ——. See Will.

BANKING—Effect of dissolution of bank on current account. See Company—Winding up.

2. —— *Stock — Transfer—Bank of England stock — Transfers forged by trustee — Claim for restoration to register by surviving trustee—Estoppel—Negligence—Ratification—Limitation of action—Bank of England public authority—Transfers a nullity—Third party proceedings by bank against jobbers and stockbrokers who presented transfers — Claim for indemnity—Costs—Limitation Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 2, 21—*Finance Act*, 1942 (5 *&* 6 *Geo.* 6, *c.* 21), *s.* 47—*Government Stock Regulations*, 1943 (*S.R. & O.*, 1943, *No.* 1), *reg.* 2.
Limitation of Action. Costs—Third party proceedings. Company—Shares—Transfer.
Welch *v.* Bank of England **Harman J. 508**

BANKRUPTCY — *Extortion — Costs wrongly demanded — Writ issued — Costs offered by debtor—Judgment debt—Demand for offered costs—Whether subsequent bankruptcy petition tainted.*
Practice and Procedure—Abuse of process.
In re Majory, A Debtor, *ex parte* The Debtor *v.* F. A. Dumont Ld. - **C.A. 600**

CHANCERY DIVISION—Jurisdiction. See Settlement.

CHARITY—*Aged, impotent and poor—Blind—Bequest to "10 blind girls Tottenham residents if possible . . ."—Similar bequest to 10 blind boys—Relief of "aged, impotent and "poor" — Words read disjunctively — Valid charitable bequest — Statute of Elizabeth I*, 1601 (43 *Eliz.* 1, *c.* 4).
In re Lewis, decd. Public Trustee *v.* Allen - - - - **Roxburgh J. 104**

2. —— *Practicability — Bequest — Whether bequest practicable—Form of inquiry.*
In re White's Will Trusts. Barrow *v.* Gillard - - - - - **Upjohn J. 188**

CHILDREN—Meaning. See Family Provision.

COAL — Nationalization. See Revenue—Profits tax.

COMPANY—*Meeting — Quorum — Quorum present at beginning of meeting—Departure of member from meeting after business begun—Quorum not present when resolution passed—Validity of resolution.*
In re Hartley Baird Ld. **Wynn-Parry J. 143**

2. —— *Party to action — Writ — Service—Foreign company—Whether "any place of "business established . . . in Great Britain"—Service after business within jurisdiction (if any) ceased—Companies Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 406, 412.
Practice—Writ—Service on foreign company.
Deverall *v.* Grant Advertising Inc. **C.A. 111**

3. —— Shares—Transfer. See Banking.

4. —— *Winding up — Costs — Costs in proceedings before winding up—Not in Companies Court—Jurisdiction to order taxation in Companies Winding-Up Department or Central Office of Supreme Court.*
In re Defiant Cycle Co. Ld. **Vaisey J. 490**

COMPANY—*continued.*

5. —— *Winding up — Disclaimer of property — Statutory undertaking—Unregistered company—Cemetery company incorporated by special Act—Application by liquidator to disclaim cemetery—Land burdened with onerous covenants—Whether jurisdiction to grant application—Companies Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 323.
In re The Nottingham General Cemetery Co. - - - - **Wynn-Parry J. 683**

6. —— *Winding up—Foreign corporation—Russian bank dissolved in country of origin—Debt owing in roubles to customer on current account—Subsequent winding up of bank in England—Proof lodged by customer—Date for conversion of debt into sterling.*
Conflict of Laws — Debt — Foreign debt — Conversion into sterling. Banking — Current account—Dissolution of bank—Effect.
In re Russian Commercial and Industrial Bank - - - - **Wynn-Parry J. 148**

7. —— *Winding up — Misfeasance — Receiver appointed by debenture holder — Whether "manager" or "officer of the "company" for purpose of misfeasance proceedings—Ambit of misfeasance proceedings—Companies Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *ss.* 333 (1), 455.
Company—Debenture—Receiver.
In re B. Johnson & Co. (Builders) Ld. **C.A. 634**

CONFLICT OF LAWS—Debt—Conversion into sterling. See Company—Winding up.

2. ——*Jurisdiction—Contract—English contract to grant patent licences — Order by foreign court directing cancellation of rights under English contract — Injunction preventing obedience to foreign court order—Extraterritorial jurisdiction—Comity.*
British Nylon Spinners Ld. *v.* Imperial Chemical Industries, Ld.
Danckwerts J. 37

CONTRACT—Patent licence. See Conflict of Laws.

2. —— Sale of land—Memorandum. See Vendor and Purchaser.

COSTS—Company winding up. See Company.

2. —— Third Party Proceedings. See Banking.

CROWN PROCEEDINGS — *Proceedings against Crown—Injunction—Minister—Application for mandatory injunction against Minister — To withdraw draft scheme from Parliament—Minister acting as representative of the Crown—Injunction not maintainable—Agricultural Marketing Act*, 1931 (21 *&* 22 *Geo.* 5, *c.* 42), *s.* 1 (8)—*Crown Proceedings*

CROWN PROCEEDINGS—*continued.*

Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 44), *ss.* 2, 17, 21.
Parliament—Privilege—Right to control own proceedings.
Merricks *v.* Heathcoat-Amory and The Minister of Agriculture, Fisheries and Food - - - - - **Upjohn J. 567**

2. ——. See Parliament.

DAMAGES—*Sale of goods—Failure to accept and pay for goods — Delivery of motor-car refused by buyer—Type readily available—Dealer entitled to profit on repudiated sale—Mitigation of damages—"Available market" —Sale of Goods Act*, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 50 (3).
Thompson (W. L.) Ld. *v.* Robinson (Gunmakers) Ld. - - - **Upjohn J. 177**

ECCLESIASTICAL LAW—*Benefice—Burden —Lay rectory — Repairs to chancel — Repairs paid for by one impropriator—Claim for contribution to costs from another impropriator—All rectorial lands sold by original impropriator —Burden to repair chancel on owner for the time being of rectorial lands — Not within implied covenant on sale for valuable consideration — Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *Sch. II.*
Vendor and Purchaser—Implied covenant—Indemnity as to purchaser's liabilities—Repairs to chancel—Liability not imposed by vendor.
Chivers & Sons Ld. *v.* Air Ministry. Queen's College, Cambridge (Third Parties)
Wynn-Parry J. 585

ENTAILED INTEREST—*Settlement—Rules applicable — Abeyance of estate — Successive entailed interests to only son of settlor and subsequently born younger sons with remainder to great-nephew—Death of tenant in tail in settlor's lifetime—Disposition of intermediate income pending birth of further sons or settlor's death—Law of Property Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *ss.* 130 (1), 175 (1).
In re Crossley's Settlement Trust. Chivers *v.* Crossley - **Wynn-Parry J. 627**

EVIDENCE—presumption. See Legitimacy.

FAMILY PROVISION — *Children — Illegitimate child — Application for maintenance — Intestacy—Claim to be illegitimate son of the intestate—Whether a dependant within the Act—Inheritance (Family Provision) Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 45)—*Intestates' Estates Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 64).
Legitimacy — Family provision. "Child." "Son." "Issue." "Family."
In re Makein, decd. Makein *v.* Makein
Harman J. 194

FISHERY — *Salmon — Licence — General — Statutory annual general licences from fishery board to fish—Commercialization of fishing by certain owners—Withholding of general*

FISHERY—*continued.*
licences from all owners—Whether river board entitled indiscriminately to withhold general licences—Salmon and Freshwater Fisheries Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 16), *ss.* 61, 93 (2) — *Hampshire Rivers Fisheries Provisional Order Confirmation Act*, 1922 (12 *&* 13 *Geo.* 5, *c. cviii*), *Sch.*: *Hampshire Rivers Fisheries Provisional Order*, 1922, *cl.* 17.
Mills *v.* Avon and Dorset River Board **Vaisey J. 341**

HOUSING—*Rent—Scheme by local authority—Differential rent scheme—Right to increase rents—Reasonable rent—Validity of scheme—Housing Act*, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *ss.* 83 (1), 85 (5) (6).
Smith *v.* Cardiff Corporation (No. 2) **Danckwerts J. 159**

INJUNCTION—Against Minister. See Crown Proceedings.

INTERNATIONAL LAW—War—Construction. See Will.

JUDICIAL PRECEDENT. See Mortmain.

LACHES. See Settlement.

LANDLORD AND TENANT—Rent restriction. See Mortgage.
2.——. See Mortmain.

LEASEHOLD—Redemption. See Mortgage.

LEGITIMACY—*Presumption—Birth certificate—Spouses married six months—Death of husband—Birth of child within nine months of the death—Remarriage of wife three months before birth of child—Second husband registered as father—Evidence—Presumption of legitimacy as child of first husband—Presumption of accuracy of statements in birth certificate—Conflict of presumptions.*
Presumption—Rebuttable.
In re Overbury, decd. Sheppard *v.* Matthews - - - - **Harman J. 122**
2. ——. See Family Provision.

LIMITATION. See Banking.

LOCAL GOVERNMENT—*Powers—Corporation—Transport—Free travel facilities for old persons in need—Payment out of general rate fund—Validity—Birmingham Corporation Act*, 1903 (3 *Edw.* 7, *c. cxcii*), *s.* 31—*Birmingham Corporation Act*, 1914 (4 *&* 5 *Geo.* 5, *c. cvi*), *s.* 12 (1)—*Birmingham Corporation Act*, 1954 (2 *&* 3 *Eliz.* 2, *c. xliv*), *ss.* 51, 55—*Road Traffic Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 72, 104.
Transport.
Prescott *v.* Birmingham Corporation **Vaisey J. and C.A. 210**
2. ——. See Housing.

MAINTENANCE OF SUIT—*Common interest—Summons to stay proceedings—Unincorporated association supporting action for river pollution by plaintiffs with legal interests in river—Association having character of mutual protection society — Plaintiffs indemnified against costs—Interest of association sufficient to refute charge of illegal maintenance — Whether procedure by way of application for stay appropriate.*
Martell *v.* Consett Iron Co. Ld. **Danckwerts J. and C.A. 363**

MERGER—Of statutory tenancy. See Mortgage.

MINES AND MINERALS—Coal Nationalization. See Revenue—Profits tax.

MORTGAGE — *Leasehold — Redemption — Recovery of possession by landlord—Order for relief against forfeiture obtained by mortgagee—New lease—Sale by mortgagee as absolute owner—Action for redemption—Mortgage still subsisting—Mortgagor entitled to order for accounts and inquiries—Law of Property Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 146 (4).
Chelsea Investments Trust Co. Ld. *v.* Marche - - - - **Upjohn J. 328**
2. —— *Redemption and foreclosure — Mortgagee in possession—Assignment of mortgage to statutory tenant—Continued tender of rent—Proceedings by statutory tenant against mortgagor—Whether plaintiff in possession as statutory tenant or as mortgagee—Foreclosure or sale—Whether tenancy merged in mortgage.*
Landlord and Tenant — Rent restriction — Statutory tenant—Merger.
Silsby *v.* Holliman - - **Upjohn J. 552**

MORTMAIN—*Lease—Forfeiture to Crown—Onerous covenants — Liability of Crown as lessee—Inquisition—Whether necessary before entering on forfeiture—Queen's Remembrancer Act*, 1859 (22 *&* 23 *Vict. c.* 21)—*Mortmain and Charitable Uses Act*, 1888 (51 *&* 52 *Vict. c.* 42), *s.* 1.
Damnosa hereditas. Landlord and Tenant—Covenant—Covenants by landlord—Whether liable before entry. Judicial Precedent—Court of Appeal decision—Per incuriam—New argument—Inconsistent with decision—Argument not maintainable.
Attorney-General *v.* Parsons - **C.A. 664**

NATIONALITY — *Naturalization — Local naturalization — Plaintiff's father naturalized in Burma—Status of plaintiff under Burma Independence Act—" British subject by naturalization " — Indian Naturalization Act* (*XXX of* 1852) — *Burma Independence Act*, 1947 (11 *&* 12 *Geo.* 6, *c.* 3), *s.* 2 (1), *Sch. I*, *paras.* 1, 2 (2).
Bulmer *v.* Attorney-General **Vaisey J. 558**

NATIONALITY—*continued.*

2. —— *Naturalization — Royal family — Statute for naturalization of Princess Sophia and "all persons lineally descending from "her" — Whether limited to persons born in the lifetime of Queen Anne — Effect of preamble on interpretation of statute—Enacting words clear, but ridiculous—Statute of* 1705 (4 *&* 5 *Anne, c.* 16)—*British Nationality Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 56), *Sch.* 4, *Part II.*
Statute—Construction—Preamble.
PRINCE ERNEST OF HANOVER *v.* ATTORNEY-GENERAL - - - - - **Vaisey J. 440**

NATIONALIZATION—Coal. See REVENUE —Profits tax.

PARLIAMENT — *Constituencies — Boundary Commission—Report—Validity—Discretion of commission—House of Commons (Redistribution of Seats) Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 66), *ss.* 2, 3; *Sch. II, rr.* 1, 4, 5, 6.
Crown Proceedings — Proceedings against Crown — Injunction — Ex parte injunction sought to restrain submission of draft Order in Council to Her Majesty—Whether Secretary of State for the Home Department rightly made defendant—Crown Proceedings Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 44), *s.* 21.
HARPER *v.* SECRETARY OF STATE FOR THE HOME DEPARTMENT - - - **C.A. 238**

2. —— Privilege. See CROWN PROCEEDINGS.

POWER OF APPOINTMENT — *Fraud on power—Benefit of non-object—Purpose—Settlement — Power of appointment among issue—Testamentary execution in favour of objects of power—Enjoyment of testator's residue conditional on settlement of appointed property by objects in favour of themselves and of non-objects.*
Will—Construction—Uncertainty—Condition subsequent — Settlement to be executed — "Within such period as my trustees shall "think reasonable." Will—Construction—Exclusion if condition unsatisfied—"Will to "take effect as if she had not been my "daughter"—Effect on exercise of power of appointment by will. Settlement—Voluntary —Spes successionis—Settlement required by condition in will—Settlement of spes successionis not required—Inclusion of spes successionis irrevocable—Settlement not voluntary.
In re BURTON'S SETTLEMENT. SCOTT *v.* NATIONAL PROVINCIAL BANK LD.
Upjohn J. 82

2. —— *Unascertainable class—Executors to divide limited sum among "friends" nominated by testator's widow—Validity of power—Question of uncertainty.*
Will — Construction — Uncertainty — Condition precedent.
In re COATES, DECD. RAMSDEN *v.* COATES **Roxburgh J. 495**

PRACTICE AND PROCEDURE — *Order — Recall — Chancery Division — Jurisdiction — Jurisdiction of judge to recall order pronounced but not entered—Whether only exercisable on application by party to suit.*
In re HARRISON'S SHARE UNDER A SETTLEMENT, HARRISON *v.* HARRISON. *In re* WILLIAMS' WILL TRUSTS. WILLIAMS *v.* RICHARDSON. *In re* ROPNER'S SETTLEMENT TRUSTS. ROPNER *v.* ROPNER. **Roxburgh J. and C.A. 260**

2. ——Writ — Service on Company. See COMPANY.

3. ——. See BANKRUPTCY—Extortion.

PRESUMPTION. See LEGITIMACY.

REVENUE—*Estate duty—Valuation—Shares —"Property deemed to pass"—Shares in company controlled by deceased—Disposition within three years of death—Method of valuation—Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2, 7 (5)—*Finance Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 55.
In re HALL'S SETTLEMENT. SANDERSON *v.* INLAND REVENUE COMMISSIONERS - **C.A. 128**

2. —— *Income tax — Employment — Perquisites or profits — Professional cricketer — Collections made for a meritorious performance —Under contract of employment collections payable to cricketer — Whether collection moneys subject to tax—Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. E, r.* 1.
MOORHOUSE (INSPECTOR OF TAXES) *v.* DOOLAND - - - - - - - **C.A. 284**

3. —— *Income tax — Settlement — Imperative trust to distribute income among specified class—Specified class unascertainable at any given time — Validity of trust — Charities members of class—Payment of income to charities—Claim for exemption from income tax—Income not income of charities —Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 37 (1) (*b*).
Trust—Uncertainty—Unascertainable class. Settlement.
INLAND REVENUE COMMISSIONERS *v.* BROADWAY COTTAGES TRUST. SAME *v.* SUNNYLANDS TRUST - - - - - - - **C.A. 20**

4. —— *Profits tax — Separate trades — Nationalized industry—Company carrying on colliery undertaking and other separate trades —Colliery undertaking nationalized—Compensation—Interim income payments—"Profits "arising from the trade or business"—Finance Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *Sch. IV, para.* 7—*Coal Industry Nationalization Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 59), *ss.* 19, 22 (2) (3) (4)—*Finance Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *ss.* 31, 32, 43—*Coal Industry (No. 2) Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 79), *s.* 1 (2).
Mines and Minerals—Coal—Nationalization.
INLAND REVENUE COMMISSIONERS *v.* BUTTERLEY CO. LD. - - - - - **C.A. 543**

SALE OF GOODS — Measure of damage. See DAMAGES.

SETTLEMENT — *After-acquired property — Marriage settlement—To be settled "upon "the trusts" declared of other fund—Whether funds amalgamated—Accretion—Hotchpot provision—Effect—Wife's will—Appointment of "wife's trust fund"—Whether after-acquired property included.*
Trust—Trust funds—Consolidation—Accretion. Hotchpot.
In re RYDON'S SETTLEMENT. BARCLAYS BANK LD. *v.* EVERITT - - - **C.A. 1**

2. —— *Hancock* v. *Watson, rule in — Accruer clause — Trust fund for two daughters of settlor with gifts over in favour of issue—Direction to treat trust fund as divided—Direction to appropriate moieties as daughters' shares — Share of deceased daughter to accrue to share of survivor—Death of daughters unmarried—No gift over on failure of issue—Rule applicable.*
In re BURTON'S SETTLEMENT TRUSTS. PUBLIC TRUSTEE *v.* MONTEFIORE
Roxburgh J. 60. C.A. 349

3. —— *Omission — Marriage settlement — Funds settled in post-nuptial settlement by husband and wife—Income of trust funds for wife for life "so long as she shall continue "to reside with" the husband—Power of appointment by surviving spouse—Limitation over on death of survivor—Disposal of income during period between death of husband and death of surviving wife—Resulting trust.*
In re COCHRANE. SHAW *v.* COCHRANE
Harman J. 309

4. —— *Revocation—Jurisdiction—Power of revocation with consent of judge of Chancery Division—No power for private person to impose jurisdiction on court—Application for judge's consent dismissed.*
Chancery Division—Jurisdiction.
In re HOOKER'S SETTLEMENT. HERON *v.* PUBLIC TRUSTEE - - **Danckwerts J. 55**

5. —— *Voluntary settlement—Grounds for setting aside—Undue influence—Relationship f father and child—Settlement by daughter n attaining her majority—No independent dvice—Father not actuated by any selfeeking motive—Father taking no interest in apital of settled fund.*
Undue Influence. Laches—Settlement—Undue influence—Delay in setting aside—attempt to persuade trustee to revoke under clause therein. Acquiescence.
BULLOCK *v.* LLOYDS BANK LD.
Vaisey J. 317

6. ——. See ENTAILED INTEREST.

HARES—Valuation for estate duty. See REVENUE.

STARE DECISIS. See MORTMAIN.

STATUTE—Construction. See NATIONALITY.

TENANTS IN COMMON. See VENDOR AND PURCHASER.

TRANSPORT. See LOCAL GOVERNMENT.

TRUST—Resulting trust. See SETTLEMENT.

2. ——. See REVENUE, SETTLEMENT.

UNDUE INFLUENCE. See SETTLEMENT.

VENDOR AND PURCHASER—*Contract—Memorandum in writing—Contract to sell undivided share in land—Contract between legal joint tenants—Whether memorandum in writing required—"Interest in land"—Meaning—Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20), ss. 40 (1), 205 (1) (ix) (x).*
Tenants in common.
COOPER *v.* CRITCHLEY - - **C.A. 432**

2. ——. See ECCLESIASTICAL LAW.

WAR—Termination. See WILL.

WILL — *Construction — Class or nominatim gift—Gift of residue in shares to named persons surviving testatrix—Share of beneficiary predeceasing testatrix to accrue to other shares —Revocation of one share by codicil—Whether intestacy as to revoked share.*
Administration of Estates—Order of application of assets — Will — Legacies—Intestacy as to share of residue—Pecuniary legacies not specifically charged — Whether chargeable against lapsed gift—Administration of Estates Act, 1925 (15 & 16 Geo. 5, c. 23), s. 34 (3), Sch. I, Part I, para. 1.
In re MIDGLEY, DECD. BARCLAYS BANK LD. *v.* MIDGLEY - - - **Harman J. 576**

2. —— *Construction—Substitutionary gift—Gift to issue of stirps after life interest—Issue required to survive date of distribution.*
MOUSLEY *v.* RIGBY - - **Roxburgh J. 139**

3. —— *Construction—Uncertainty—Condition subsequent—Name and arms clause—Direction to "assume the surname."*
Name and Arms Clause—Validity.
In re MURRAY, DECD. MARTINS BANK LD. *v.* DILL - - - - - - **C.A. 69**

4. —— *Construction—War condition—Devise of property on condition that "peace be "declared"—Whether condition satisfied.*
International Law—War—Termination.
In re GROTRIAN. COX *v.* GROTRIAN
Danckwerts J. 501

5. —— Construction. See POWER OF APPOINTMENT.

6. ——. See POWER OF APPOINTMENT.

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PART I.—JANUARY

TABLE OF CASES

CHANCERY DIVISION PAGE

BRITISH NYLON SPINNERS LD. *v.* IMPERIAL CHEMICAL INDUSTRIES LD. 37
BURTON'S SETTLEMENT TRUSTS, *In re.* PUBLIC TRUSTEE *v.* MONTEFIORE 60
HOOKER'S SETTLEMENT, *In re.* HERON *v.* PUBLIC TRUSTEE 55
INLAND REVENUE COMMISSIONERS *v.* BROADWAY COTTAGES TRUST C.A. 20
INLAND REVENUE COMMISSIONERS *v.* SUNNYLANDS TRUST ... C.A. 20
RYDON'S SETTLEMENT, *In re.* BARCLAYS BANK LD. *v.* EVERITT C.A. 1

FOR MODE OF CITATION, SEE BEGINNING OF INDEX
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